No. 92-1851

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

ROBERT DAILEY and REGGIE LEACH, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

THE NATIONAL HOCKEY LEAGUE, THE NATIONAL HOCKEY LEAGUE PENSION SOCIETY, THE MANUFACTURERS LIFE INSURANCE COMPANY, JOHN ZIEGLER, BOSTON PROFESSIONAL HOCKEY ASSOCIATION INC., CALGARY FLAMES HOCKEY CLUB, CHICAGO BLACKHAWK HOCKEY TEAM, INC., DETROIT RED WINGS, INC., EDMONTON OILERS

(Continued)

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH H. KENNEY
MARK SCHWARTZ
KENNEY & KEARNEY
Attorneys for Petitioners
Woodland Falls Corporate Park
220 Lake Drive East
P.O. Box 5034
Cherry Hill, New Jersey 08034-0421
(609) 779-7000

3687
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

HOCKEY LTD., 8 HOCKEY VENTURES, INC., HARTFORD WHALERS HOCKEY CLUB, Le CLUB De HOCKEY CANADIEN INC., Le CLUB De HOCKEY LES NORDIQUES, L. A. KINGS, LTD., MAPLE LEAF GARDENS LIMITED, MEADOWLANDERS, INC., NASSAU SPORTS, NEW YORK RANGERS HOCKEY CLUB (A Division of Madison Square Garden Center, Inc.), NIAGARA FRONTIER HOCKEY, L.P., NORTHSTAR HOCKEY CLUB, INC., PHILADELPHIA FLYERS LIMITED PARTNERSHIP, PITTSBURGH PENGUINS, INC., ST. LOUIS BLUES HOCKEY CLUB, LTD., VANCOUVER HOCKEY CLUB, LTD., WASHINGTON HOCKEY LIMITED PARTNERSHIP,

Respondents.

QUESTION PRESENTED

I. Whether petitioners' suit under ERISA, an Act designed by Congress to protect the pensions of American workers by requiring exclusive federal jurisdiction to guarantee uniformity of rulings, should have been dismissed under the abstention principles of *Princess Lida* when a prior Canadian action was filed and that Canadian court has specifically held that petitioners' ERISA claims are barred from being heard.[1] This is a "frontier issue"[2] in which two other Circuits, contrary to the Third Circuit, have refused to utilize abstention principles to dismiss federal ERISA actions where doing so would result in deprivation of such claims.[3]

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1. Order and Notice, Ontario Court of Justice, June 26, 1991 (1a).

2. *Dailey v. National Hockey League*, 987 F.2d 172, 177 (3d Cir. 1993) (20a).

3. *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980); *Central States Southeast and Southwest Areas Health & Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671 (7th Cir. 1979); *Marshall v. Chase Manhattan Bank*, 558 F.2d 680 (2d Cir. 1977).

LIST OF PARTIES

The parties appearing in the United States Court of Appeals for the Third Circuit were Robert Dailey and Reggie Leach, appellees below, and petitioners here. The appellants are: (1) the National Hockey League, (2) the National Hockey League Pension Plan and Trust, (3) the National Hockey League Pension Society, (4) the Manufacturers Life Insurance Company, (5) John Ziegler, and (6) the twenty-one (21) member clubs of the National Hockey League: including Boston Professional Hockey Association, Inc., Calgary Flames Hockey Club, Chicago Blackhawk Hockey Team, Inc., Detroit Red Wings, Inc., Edmonton Oilers Hockey Ltd., 8 Hockey Ventures, Inc., Hartford Whalers Hockey Club, Le Club De Hockey Canadien Inc., Le Club De Hockey Les Nordiques, L.A. Kings, Ltd., Maple Leaf Gardens Limited, Meadowlanders, Inc., Nassau Sports, New York Rangers Hockey Club (A Division of Madison Square Garden Center, Inc.), Niagara Frontier Hockey, L.P., Northstar Hockey Club, Philadelphia Flyers Limited Partnership, Pittsburgh Penguins, Inc., St. Louis Blues Hockey Club, Ltd., Vancouver Hockey Club, Ltd., Washington Hockey Limited Partnership.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit in this action is reported at 987 F.2d 172 (3d Cir. 1993) (10a).

The District Court's original opinion is reported at 780 F. Supp. 262 (D.N.J. 1991) (28a).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit denied petitioners' timely petition for rehearing with suggestion for rehearing *en banc* on March 19, 1993 (52a). A judgment in lieu of mandate was issued on March 29, 1993 (54a). The jurisdiction of this Court is hereby invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case requires the Court to analyze whether the abstention principles enunciated in *Princess Lida of Thurn* and *Taxis v. Thompson,* 305 U.S. 456 (1939) ("*Princess Lida*"), mandate dismissal of a case where such action would deprive the plaintiffs of the only forum available to them to litigate their claims under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"). Petitioners allege here that various provisions of ERISA, specifically 29 U.S.C. §§ 1103, 1104, and 1109, were violated by the defendants' mismanagement and diversion of millions in surplus pension funds that should have been used for the exclusive benefit of plan participants.

The foregoing sections of ERISA impose various fiduciary responsibilities upon trustees of a pension plan. For example,

§ 1103(c)(1) provides that the assets of a pension plan are to be used for the exclusive purpose of providing benefits to plan participants:

> Except as provided in paragraph (2), (3), or (4), or Subsection (d) of this section, or under Sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Additionally, § 1109 expressly provides that anyone who is a fiduciary of a pension plan can be held liable for the breach of any duty imposed upon him or her by ERISA:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the Court may deem appropriate, including removal of such fiduciary.

The issue raised by this petition is whether these federally protected rights can be deprived by the application of judicial abstention principles where a similar, but not identical, action is

pending in a foreign court and where pursuit of such federally vested rights and remedies are barred by that court's order.

The importance of this issue cannot be over emphasized. If the Third Circuit's decision is allowed to stand, it will totally thwart Congress' intended protections. Where states previously controlled pension plans with varying degrees of success, something Congress specifically intended to stop by creating uniformity and controlling vesting of pension rights, hundreds of nations may now be able to control the pensions of American workers without regard to ERISA.

This is not a fictitious argument. Japanese companies have plants in the United States employing American workers. So do German, Canadian, Swedish, and many other countries' businesses. If these corporations place the situs of their pension funds in their own country, the Third Circuit's decision would render ERISA powerless to provide any protections to the American worker.[4] Moreover, from a practical point the Third Circuit's approach is unworkable. The lower federal courts would be required to compare the relative congruence of each nation's pension laws to determine whether deference causes detriment to the plan participants. Indeed, the Third Circuit's failure to enforce ERISA's unique protections even raises a serious separation of powers issue.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

Subject matter jurisdiction over this action exists pursuant to 28 U.S.C. § 1331 which vests the federal courts with jurisdiction

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4. For example, this may well leave the American worker in a Honda plant in Marysville, Ohio without the protections afforded General Motors, Ford or Chrysler workers in the very same state or town.

over cases that arise under federal law. The present class action was instituted in the District of New Jersey pursuant to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*

B. Factual Background

Robert Dailey and Reggie Leach are former professional hockey players. They filed the instant class action lawsuit on June 6, 1991 in the District Court for the District of New Jersey. Their complaint alleges that defendants, the National Hockey League, National Hockey League Pension Plan and Trust, National Hockey League Pension Society ("Pension Society"), Manufacturers Life Insurance Company, ("Manulife"), John Ziegler, the then President of the National Hockey League, and its member clubs, violated various provisions of the Employee Retirement Income Security Act ("ERISA") in connection with the funding, administration, and management of the National Hockey League Pension Plan and Trust ("NHL Pension Plan"). The thrust of plaintiffs' complaint is that the various defendants violated ERISA by their improper diversion of surplus funds that were generated in the pension plan that should have been used for the exclusive benefit of participating players. This exclusive benefit requirement was expressly contained in the written agreement embodying the NHL Pension Plan which was formally memorialized in 1967 (30a).[5]

C. History of The NHL Pension Plan

The NHL Pension Plan was established in 1947. It was formally memorialized into a written document in 1967. Until 1986, the Pension Society invested all of the funds under the pension plan in a group annuity contract with defendant Manulife. Under this contract, surplus funds were to be generated to the

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5. All references are to factual assertions set forth in the opinions below.

extent that Manulife was able to earn a rate of return on the funds deposited in the contract in excess of the internal rate of return on which the contract was based (29a-30a).

The Pension Plan documents specifically directed that all surplus funds generated by the pension plan were to be used for the exclusive benefit of players in the plan and were to be allocated to their accounts on a regular basis at five-year intervals. The agreement further prohibited any amendments of the plan without the express consent of plan participants.

From 1972 to 1987, the Pension Plan was amended and restated on four (4) separate occasions without the express consent of the beneficiaries. These amendments left intact both the exclusive benefit provisions of the original plan documents, as well as the prohibition of amendments to the plan without the express consent of the beneficiaries (30a).

Despite the fact that substantial surplus funds were generated in the pension plan, allocations of surplus were not made to plan participants for 1972 and 1977. Thereafter, in 1982, an agreement was reached between Manulife and the NHL Pension Society whereby Manulife agreed to disgorge approximately $2,993,000 of surplus funds from the pension plan to the Pension Society. The Pension Society, however, only allocated approximately $1,000,000 of this returned surplus to the accounts of retired participants in the pension plan. The remaining $1,993,000 was improperly refunded to member clubs in the NHL and was removed completely from the pension plan. The participants of the pension plan received no notice whatsoever of this diversion of plan assets that unquestionably inured to their detriment (31a).

In or about 1984 or 1985, defendants Pension Society, NHL, and its member clubs expressed their dissatisfaction with the amount of surplus funds that had previously been refunded by

Manulife to the Pension Society. Thereafter, an additional agreement was reached between the Pension Society, the NHL, its member clubs, and Manulife whereby Manulife agreed to refund an additional $24,000,000 in surplus funds that had previously accrued in the NHL Pension Plan. In exchange for Manulife's agreement to disgorge surplus funds, the Pension Society agreed to allow Manulife to convert from a participating to a nonparticipating group contract, which meant that surplus funds would no longer be generated in the pension plan. Plan participants and beneficiaries received no notice of this conversion (31a-32a).

Of the $24,000,000 refunded to the Pension Society, only $4.4 million dollars was allocated by the Pension Society to the accounts of retired participants in the pension plan. Of the remainder, approximately $16.5 million dollars was improperly allocated by the Pension Society to the accounts of the member clubs. Thereafter, in or about 1986, the NHL and its member clubs negotiated a new Collective Bargaining Agreement with the National Hockey League Players Association, the labor union for present hockey players. The Collective Bargaining Agreement contained provisions requiring that all member clubs make certain defined contributions to the pension accounts of then-active NHL players. A substantial portion of the surplus pension funds that were refunded to the defendants by Manulife have been used to fund the member clubs' obligations under its current Collective Bargaining Agreement with present NHL players. These surplus funds legally belong to the earlier plan participants, and the defendants' use of such funds to satisfy current pension obligations continues their long history of violating ERISA in their improper funding, administration, and maintenance of the NHL Pension Plan (32a).

D. Procedural History

On August 2, 1991, defendants filed a motion seeking dismissal of petitioners' complaint. Defendants argued that

dismissal was mandated because an analogous action filed by seven (7) other former hockey players is pending in the Ontario Court of Justice in Ontario, Canada. The Canadian action was filed on April 26, 1991 on behalf of a different group of retired hockey players. However, plaintiffs in the Canadian action are not permitted to assert any of their ERISA claims. By Stipulation and Order of the Court, the Canadian lawsuit was declared a "representative action." (1a). As such it will operate in a manner similar to a class action under Fed. R. Civ. P. 23. However, in addition to certifying a "representative action," the order further limits adjudication of plaintiffs' claims to only those cognizable under Canadian common law. This order therefore eliminates ERISA's availability to any of the various members of the representative class in Canada, and deprives plan participants like petitioners of ERISA's unique protections.

On December 30, 1991, defendants' motion to dismiss was denied. The district court concluded that dismissal of petitioners' action was not mandated by the abstention principles enunciated by this Court in *Princess Lida.* This was due, in large part, to the district court's unwillingness to deprive petitioners of the only forum available to them to litigate their ERISA claims. The district court further noted that its decision was consistent with then existing case law in which other circuit courts of appeal have refused to apply abstention principles in ERISA actions where doing so deprived plaintiffs of the only forum available to litigate their ERISA claims.

On January 14, 1992, defendants petitioned the district court for certification of its December 30, 1991 Order for interlocutory review pursuant to 28 U.S.C. § 1292(b), which was granted on February 27, 1992. Thereafter, on March 9, 1992, defendants filed a petition for leave to appeal, and sought a stay of all proceedings from the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1292(b). That petition was granted on March 20, 1992.

The interlocutory appeal in this matter was argued on September 21, 1992. On February 18, 1993, a divided court (Judge Samuel A. Alito, dissenting) issued an opinion reversing the order of the district court and dismissed petitioners' complaint. On March 4, 1993, appellees filed a petition for rehearing with a suggestion for rehearing *en banc*. This petition for rehearing was subsequently denied on March 19, 1993.

The majority concluded that this action and the action pending in Canada were so similar that *Princess Lida* mandated the dismissal of petitioners' complaint. In doing so, however, the majority conceded that "[t]he considerations that dictate the proper result are far from clear." *Dailey*, 987 F.2d at 178. Judge Colin J. Seitz, the author of the majority's opinion, noted that the issue of *Princess Lida's* applicability to ERISA actions was a "frontier" issue. *Id.* at 177.

In ruling that *Princess Lida* principles required the dismissal of petitioners' complaint, the majority has effectively eliminated the only forum available to these petitioners to litigate their ERISA claims. Dissenting, Judge Alito disagreed with the majority's holding and declared that Congress has already determined the uniqueness of ERISA's remedies which can only be guaranteed by federal supervision. He thus determined that the inquiry should end there and that affirmance was accordingly mandated.

REASONS FOR GRANTING THE WRIT

I.

CONGRESS ENACTED ERISA TO PROVIDE A UNIFORM AND UNIQUE METHOD OF PROTECTING THE PENSIONS OF AMERICAN WORKERS, AND THE NHL PENSION CLEARLY FALLS WITHIN THOSE PROTECTIONS.

In enacting ERISA, Congress acknowledged that, up to that point, the protection of an American worker's pension rights was left to the vagaries of each state's law and that significant injustices were occurring:

> In the absence of adequate federal standards, the participant is left to rely on the traditional equitable remedies of the common law trust. A few states, including New York, Washington, Wisconsin, Massachusetts, and California have codified existing trust principles in an act of legislation which requires in many instances a degree of disclosure similar to that required by federal statute.
>
> The fact that statutory rules exist says little as to their efficacy in adjusting inadequacies that are visited upon plan participants as evidenced by the hearings before this committee. In almost every instance, participants lose their benefits not because it is in violation of federal law but rather because of the manner in which the plan is executed with respect to its contractual requirements in vesting or funding. Courts strictly interpret the plan indenture and

> are reluctant to apply concepts of equitable relief or to disregard technical document wording. Thus, under the present law, accumulated pension credits can be lost even when separated employees are within a few months, or even days of qualifying for retirement.

H.R. Doc. No. 93-533, 93rd Cong., *reprinted in* 1974 U.S. Code and Cong. & Ad. News 4639, 4743.

Similarly the Chairman of the full Committee on Education and Labor, Congressman Perkins, a co-sponsor of the original ERISA bill, echoed the same concerns to the full House:

> Our private pension plans have served the needs of many workers very well. But the system is subject to one very simple defect. Too many people pay money into private pension plans year after year expecting eventually to receive retirement income, and they end up getting nothing.
>
> And that, Mr. Chairman, is what this bill is all about. It is unfair and inequitable and almost invariably tragic as well, for workers to defer income from wages or salary in anticipation of retirement benefits which they will never get . . . .

120 Cong. Rec. 4277 (1974).

With these factors in mind, Congress decided to enact a uniform and unique method of protecting the American worker's pension plan:

> [Congress finds] that despite the enormous growth in such plans, many employees with long years of employment, are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of the plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interest of employees and their beneficiaries, for the protection of the revenue of the United States, and the need for the free flow of commerce, that minimum standards should be provided insuring the equitable character of such plans and their financial soundness.

29 U.S.C. § 1001(a).

In the instant case, there is no question but that the NHL Pension Plan is governed by ERISA. Unless otherwise exempted, an "employee pension benefit plan" is covered by the provisions of Title I of ERISA. 29 U.S.C. § 1003(a) . An "employee pension benefit plan" is defined under ERISA as any plan, fund, or program established by an employer which provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. 29 U.S.C. § 1002(2)(a). In this case, there is no question that the NHL Pension Plan provides retirement income to the petitioners who are former employees of the defendant member clubs. Thus, the plan is clearly an "employee pension benefit plan" within the meaning and coverage of ERISA.

In addition to the foregoing to establish ERISA's applicability, it must also be shown that the pension benefit plan was established or maintained by an "employer" engaged in "commerce" or any "industry or activity effecting commerce." *See* 29 U.S.C. § 1003(a)(1). Again, this requirement is easily met here. All of the member clubs conduct regular and continuous business activities throughout the United States in the scheduling and conduct of professional hockey games. Moreover, most of the twenty-four (24) current member clubs are residents of the United States in their respective home cities and have a significant impact upon the local and regional economies of those areas. Thus, the NHL and its member clubs are clearly engaged in commerce or in industry affecting commerce, and ERISA's applicability to the NHL Pension Plan is beyond dispute. *See* 29 U.S.C. § 1002(5), (11) and (12).[6]

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6. It must also be noted that the Plan Documents themselves refer to and incorporate ERISA. *See* Second Restated Agreement, Article 102(a) (56a); Third Restated Agreement, Article 102(a) (60a). Thus, there can be no doubt that ERISA applies to the NHL Pension Plan.

II.

THE UNIQUE PROTECTIONS AND REMEDIES OF ERISA CAN ONLY BE GUARANTEED TO THE NHL PENSIONERS BY FEDERAL SUPERVISION, AND THE THIRD CIRCUIT'S ERRONEOUS APPLICATION OF *PRINCESS LIDA* DENIES THOSE PROTECTIONS.

Princess Lida was developed to prevent conflicts of rulings where actions have been filed against the same *res* in state and federal court. In *Princess Lida*, trustees of a fund in which Lida and her sons were beneficiaries brought an accounting action in the Common Pleas Court of Pennsylvania. Thereafter, Lida and one of her sons brought an action in federal court claiming that the trust had been mismanaged, and sought removal of the trustees as well as the return of surplus funds. In dismissing the federal action, this Court declared that where two suits are filed in separate courts and are *in rem* or *quasi in rem* in nature so that "the court . . . has possession or must obtain control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought . . .," the court in which the last suit was filed is to relinquish its jurisdiction in favor of the first court. *Princess Lida*, 305 U.S. at 466.

Princess Lida is thus, in essence, an abstention doctrine since rather than finding a lack of jurisdiction *ab initio*, it determined that, for prudential reasons, the exercise of jurisdiction was unwise and should be declined. Abstention doctrines are based upon federalism, i.e. having the federal government withhold taking action until the state court has had an opportunity to remedy the situation. *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941) (unsettled questions of state law must be decided by state courts); *Younger v. Harris*, 401 U.S. 37 (1971) (federal courts may not enjoin ongoing state criminal proceedings); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) (eminent

domain proceedings based upon state statute more appropriately handled by state court).[7]

In the instant case, however, no state court involvement is present. Accordingly, abstention principles such as *Princess Lida* should be inapplicable in the first place. This is precisely the result reached by Judge Alito in his dissent:

> The *Princess Lida* doctrine was developed to prevent conflicts between the courts in this country. In *Princess Lida* itself the court observed that "[t]he doctrine is necessary to the harmonious cooperation of federal and state tribunals." 305 U.S. 456, 466 (1939). [Citations omitted.] When the doctrine is applied in that context, federal statutory rights are not eradicated.
>
> The majority in this case has applied the *Princess Lida* doctrine in an entirely different context and in doing so has abrogated federal statutory rights. Neither the majority nor the appellants have cited any precedents supporting such a result.

Dailey, 987 F.2d at 179 (Alito, J. dissenting).

In refusing to dismiss petitioners' complaint, the district court

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7. If the Canadian litigation is entitled to any deference at all, it can only be due to the concept of comity. Comity, however, is not mandatory; it is purely discretionary. *Majorica S.A. v. Malorica Inter. Ltd.*, 687 F. Supp. 92, 96 (S.D.N.Y. 1988). The district judge in *Dailey* exercised this discretion in favor of retaining jurisdiction and decided that the parties were best served by allowing this action to proceed. When this action got to the remedy stage, the court stated it would consider the Canadian judgment in awarding relief under ERISA.

was likewise unwilling to apply *Princess Lida* since it would deprive the plaintiffs of the only forum where their ERISA claims could be litigated:

> We therefore find that plaintiffs' ERISA claims would be lost if they were forced to press their grievances only before a Canadian court and we further find that such a loss could be of material significance to plaintiffs' case. This consideration, in conjunction with our analysis above indicating that these two actions will not require either this court or the Canadian court to exercise *quasi in rem* jurisdiction within the meaning of *Princess Lida*, leads us to conclude that the *Princess Lida* doctrine does not compel dismissal of this case.

Dailey, 780 F. Supp. at 271.

The district court properly analyzed *Princess Lida* with an eye toward the calamitous effect its application would have here in depriving petitioners of important federal statutory rights. The flexible approach adopted by the district court in its *Princess Lida* analysis was fully in accord with this Court's formulation of the doctrine which, as the dissent rightly pointed out, was limited to concerns regarding the harmonious cooperation of federal and state tribunals. In applying *Princess Lida* to this action, the Third Circuit extended its principles beyond the realm for which they were created, and the Third Circuit's decision should be reviewed and reversed.

With very little analysis, the majority below summarily rejected petitioners' claim that the presence of their ERISA claims precluded the dismissal of this action under *Princess Lida*. While conceding that ERISA reflects a "strong public policy . . . designed

to protect pension rights," the majority felt that the potential for conflicting results outweighed ERISA's policy for protecting pension rights. *Dailey,* 987 F.2d at 178. Such a finding is indeed extraordinary, since no other court has ever been willing to invoke abstention principles to dismiss an ERISA action. *Levy v. Lewis,* 635 F.2d 960 (2d Cir. 1980); *Central States Southeast and Southwest Areas Health & Welfare Fund, v. Old Security Life Insurance Co.,* 600 F.2d 671 (7th Cir. 1979); *Marshall v. Chase Manhattan Bank,* 558 F.2d 680 (2d Cir. 1977). These courts were properly cognizant of ERISA's uniqueness and were unwilling to dismiss such claims given Congress' overwhelming desire to allow such claims to proceed in the federal courts.

Illustrative of the approach adopted by these courts is *Levy v. Lewis.* In *Levy,* the plaintiff filed an ERISA action in federal court subsequent to the filing of a state court proceeding by the New York State Superintendent of Insurance, who was acting as the state-appointed rehabilitator and liquidator of plaintiffs' former employer. The federal complaint asserted two types of ERISA claims under both 29 U.S.C. § 1132(a)(1)(b) and (a)(2). The Second Circuit affirmed the dismissal of the § 1132(a)(1)(b) claim, which is not subject to exclusive federal court jurisdiction, *see* 29 U.S.C. § 1132(a)(1), holding that the *Colorado River Doctrine* required dismissal of that claim. *Levy,* 635 F.2d at 967.

When the court considered plaintiffs' § 1132(a)(2) claim for breach of fiduciary duty under 29 U.S.C. § 1109, however, it reached the opposite conclusion. The court held that the *Colorado River Doctrine* was not applicable to that claim because such claims are subject to exclusive federal court jurisdiction, and, therefore, the court could not dismiss that claim under that theory:

> In *Marshall v. Chase Manhattan Bank* . . . this Circuit held that claims for a breach of fiduciary duty under ERISA must be decided in

> a federal court even though state proceedings to wind-up an ERISA fund had been begun by the Fund's trustee in state court. Similarly, abstention has been denied in other cases where claims of a breach of fiduciary duties by an ERISA fiduciary were alleged although related state proceedings were under way . . . . Where exclusive jurisdiction exists, only the federal courts can provide affirmative relief. . . . Thus, federal courts must hear claims within their exclusive jurisdiction, for otherwise the right alleged would never be fully adjudicated . . . Abstention for purposes of judicial economy under *Colorado River* applies only where concurrent federal-state jurisdiction exists.

Levy, 635 F.2d at 967 (citations omitted).

To support its decision here, the Third Circuit cited with approval a First Circuit decision in which a federal securities claim over which exclusive federal jurisdiction existed was dismissed in favor of a similar action pending in Canada. *Howe v. Goldcorp Investments Ltd.*, 946 F.2d 944 (lst Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1172 (1992). In *Howe*, plaintiff's private securities law action against a Canadian corporation was dismissed under *forum non conveniens* principles despite the fact that these claims were subject to the exclusive jurisdiction of the federal courts. The court determined that dismissal would not prejudice the plaintiff because "Canadian courts will either apply American law . . . or they will apply Canadian laws that offer . . . somewhat similar protection . . . . " *Id.* The majority below found "Howe to be persuasive in its treatment of loss of claims subject to the exclusive jurisdiction of the federal courts . . . ," and noted that it would be an anomaly if a different standard applied concerning

Princess Lida abstention. *Dailey,* 987 F.2d at 178. Such a view ignores congressional intent and deprives litigants like petitioners of their ability to vindicate significant federal statutory rights which the federal courts must protect if such remedial acts of Congress are to have any real efficacy.

Howe is also easily distinguishable from the present action. Unlike the plaintiff in *Howe,* petitioners here are significantly prejudiced by being forced to litigate their action in Canada. Petitioners would be precluded, by court order, from litigating their ERISA claims in the Canadian litigation. ERISA provides petitioners with an important advantage that would obviously be lost as a result of dismissal of this case and this loss should not have been afforded such little weight in the majority's analysis of Princess Lida.[8]

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8. Moreover, even if this Count is inclined to compare Canadian Law and ERISA, several differences would be discovered. For example, 403(c) of ERISA [29 U.S.C. 1103(c)] strictly prohibits the withdrawal of surplus assets from a pension plan prior to its termination. On the other hand, withdrawals of surplus are actually *sanctioned* by Canadian statutes and regulations if permission is obtained from Canadian pension authorities. Scane, R.E. "Legal Positions in Ontario on Withdrawals of Surplus," *included in* A Report of the Task Force on Inflation Protection for Employment Pension Plans (1980), Volume II, Research Studies (Queens Printer for Ontario), at pg. 161 (00a). In 1982, the defendants utilized these very procedures to withdraw approximately $2,993,000 from the NHL Pension Plan. $469,841 of such surplus assets were actually withdrawn from the Pension Plan and dispersed to the member clubs. A reversion of this type from an on-going plan is strictly prohibited by 403 of ERISA, but is perfectly legal in Canada. This is but one illustration of how petitioners are placed at a significant legal disadvantage in having to litigate their claims in Canada, and this Count should not allow the Third Circuit's decision to have such an effect on petitioners' ERISA rights.

The district court was particularly cognizant of the special nature of ERISA's remedies. In rejecting the NHL defendants' argument that the remedies in Canada were similar to those under ERISA, the district court declared that such a finding would render ERISA's uniqueness meaningless: (Cont'd)

Moreover, from a practical point of view, the majority's endorsement of the *Howe* approach for resolving loss of claims subject to the exclusive jurisdiction of the federal courts is itself impractical. Applying this approach, a court would be required to compare the relative congruence of each nation's pension laws to determine whether deference causes detriment to the plaintiff. In enacting ERISA, Congress has already made a determination in favor of granting exclusive federal jurisdiction to the federal courts due to the special nature of ERISA's remedies. Federal courts should be loath to utilize judiciallycreated abstention principles to avoid jurisdiction over cases where, Congress, having found a significant national interest, vests them with exclusive federal jurisdiction.

III.

THE THIRD CIRCUIT'S DECISION VIOLATES THE DOCTRINE OF SEPARATION OF POWERS.

The Third Circuit's refusal to exercise jurisdiction over this action further violates the doctrine of separation of powers by flatly ignoring a clear directive from Congress that our federal courts exercise exclusive jurisdiction over ERISA claims. In rejecting defendants' argument that the similarity of remedies available under ERISA and Canadian law justified dismissal of this action, Judge Alito tacitly recognized this point:

(Cont'd)

> While the common law analysis the Canadian Court will employ to dispose of the claims before it may share similarities with the analysis this court would apply to plaintiffs' ERISA claims, to say that they are fungible and interchangeable is, in effect, to eviscerate the exclusive jurisdiction provision that Congress explicitly included in ERISA.

Dailey, 780 F. Supp. at 271.

> In my view, however, it makes no difference whether Canadian law is similar to or even in some sense better than ERISA. What matters is that Congress wanted ERISA to govern the NHL pension plan, but the majority has frustrated the implementation of that intent.

Dailey, 987 F.2d at 179 (Alito, J., dissenting).

Under Article III of the United States Constitution, "[t]he judicial power of the United States shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." Thus, the federal judiciary's role in our constitutional system of government is a limited one. Where Congress has spoken, the judiciary's constitutional function is to decide cases in accordance with the legislative directives of Congress. *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 95-96 (1981). In meeting this constitutional responsibility, a federal court must "give effect to the unambiguously expressed intent of Congress." *Norfolk & Western v. American Train Dispatchers*, __ U.S. __, 111 S. Ct. 1156, 1163 (1991), *quoting Chevron U.S.A. Inc. v. National Resources Defense Council. Inc.*, 467 U.S. 837, 842-843 (1984). A court is not free to ignore legislation simply because it believes it is imprudent or unfounded. *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983); *United States v. Rutherford*, 442 U.S. 544, 555 (1979). So long as the law is constitutional, federal courts must apply that law as written, and cannot refuse to do so though it believes that other non-constitutional reasons justify such inaction. *Id.*

As Chief Justice Marshall explained long ago in *Cohens v. Virginia*, 6 Wheaton 264, 404 (1821), refusing to exercise jurisdiction over a matter within the federal judiciary's authority is just as unconstitutional as an active usurpation of another branch's

powers because such action would nullify the other branch's power to act:

> With whatever doubts, with whatever difficulties, a case may be attended, we [federal courts] must decide it, if it is brought before us. We have no more right to decline jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.

In enacting ERISA and vesting federal courts with exclusive jurisdiction, Congressional intent is unmistakably clear and unequivocal. Sensing an urgent need for remediation, Congress enacted an elaborate statutory scheme to protect pension rights, and federalized an area of the law where a compelling national interest exists. Congress' action in this area was well within its constitutional authority to regulate matters affecting commerce (U.S. Const. Art. I, § 8, cl. 3), and its vesting of exclusive jurisdiction with the federal courts was likewise within its constitutional powers. (U.S. Const. Art. III, § 1). Thus, in ignoring Congress' unambiguous intention that the federal courts exercise exclusive jurisdiction over ERISA claims, the Third Circuit has exceeded its sphere of constitutional authority, and its decision declining jurisdiction over this action violates the doctrine of separation of powers.

CONCLUSION

WHEREFORE, petitioners respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JOSEPH H. KENNEY
MARK SCHWARTZ
KENNEY & KEARNEY
Attorneys for Petitioner

MARK SCHWARTZ
RALPH R. SMITH, 3rd
On the Petition

APPENDIX A — ORDER OF THE ONTARIO COURT OF JUSTICE (GENERAL DIVISION)

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
COURT FILE NO. RE 785/91

THE HONOURABLE MR. JUSTICE POTTS

WEDNESDAY, THE 26TH
DAY OF JUNE, 1991

BETWEEN:

ANDREW BATHGATE, CARL THOMAS BREWER, GORDON HOWE, ROBERT M. HULL, ALLAN HERBERT STANLEY, EDWARD SHACK, LEO CHARLES REISE.

Applicants

-and-

THE NATIONAL HOCKEY LEAGUE PENSION SOCIETY, THE MANUFACTURERS' LIFE INSURANCE COMPANY, JOHN ZIEGLER on his own behalf and on behalf of all member clubs comprising the National Hockey League, Boston Professional Hockey Association, Inc., Calgary Flames Hockey Club, Chicago Blackhawk Hockey Team, Inc., Detroit Red Wings, Inc., Edmonton Oilers Hockey Ltd., 8 Hockey Ventures, Inc., Hartford Whalers Hockey Club, Le Club De Hockey Canadien Inc., Le Club De Hockey Les Nordiques 1979, Societe En Commandite, L.A. Kings, Ltd., Maple Leaf Gardens Limited, Meadowlands, Inc., Nassau Sports, New York Rangers Hockey Club (A Division of Madison Square Gardens Centre, Inc.), Niagara Frontier Hockey, L.P., Northstar Hockey Partnership,

Appendix A

Philadelphia Flyers Partnership Limited, Pittsburg Penguins Inc., St. Louis Blues Hockey Club, L.P., Vancouver Hockey Club, Ltd. and Washington Hockey Limited Partnership.

Respondents

ORDER

THIS MOTION, made by the solicitors for the Respondents, for an Order to direct that this Application proceed by way of action to trial, to remove John Ziegler, both on his own behalf and on behalf of the member club comprising the National Hockey League, to appoint National Hockey League Players' Association as representative of its members and to appoint the Applicants as Representatives of certain beneficiaries of the National Hockey League Pension Plan and Trust was heard this day at 130 Queen Street West, Toronto, Ontario.

ON THE CONSENT OF THE PARTIES and upon the Court being satisfied that all Player Participants, as defined in the National Hockey League Pension Plan and Trust (the "Plan") (and including, for greater certainty, all former Player Participants on the rolls of the Pension Society) with service under the Plan on or before June 30, 1982 and the "Beneficiaries", as defined in the Plan, of such deceased Player Participants are of the same interest, except insofar as the amount of vested service attributable to each such Player Participant may vary.

1. THIS COURT ORDERS that Andrew Bathgate, Carl Thomas Brewer, Gordon Howe, Robert M. Hull, Allan Herbert Stanley, Edward Shack and Leo Charles Reise are appointed as Representatives of those Players Participants of the Plan with service under the Plan on or before June 30, 1982 and beneficiaries of such deceased Player Participants with respect to the subject matter of this proceeding and not any statutory claims which may be raised under the laws of any other jurisdiction.

Appendix A

2. THIS COURT FURTHER ORDERS that the National Hockey League Pension Society (the "Pension Society") send by regular mail on or before July 5, 1991 a copy of the Notice attached hereto as Schedule "A" to all Player Participants and Beneficiaries of deceased Player Participants under the Plan on the rolls of the Pension Society, irrespective of the period of service of such Player Participants under the Plan and that the envelopes containing the Notice are to contain no other message or communication.

3. THIS COURT FURTHER ORDERS that the Pension Society provide to the Applicants a complete list of the names and addresses of the Player Participants and the Beneficiaries of deceased Player Participants on the rolls of the Pension Society.

4. THIS COURT FURTHER ORDERS that once all Notices referred to in paragraph 2 hereof have been mailed, the Pension Society provide to the Court the Affidavit of Service of such officer or employee of the Pension Society responsible for the mailing.

5. THIS COURT FURTHER ORDERS that the Notice referred to in paragraph 2 hereof and attached as Schedule "A" hereto contain a notice to the effect that any Player Participant with service under the Plan on or before June 30, 1982, or Beneficiary of such deceased Player Participants of the Plan who wishes to obtain relief pursuant to Rule 10.03 of the Rules of Civil Procedure must do so on or before July 26, 1991 and a further notice to the effect that any Player Participant with service after June 30, 1982 or Beneficiary of such deceased Player Participant may apply to be joined as a party to the proceeding pursuant to Rules 5.03(4) and 9.04 of the Rules of Civil procedure on or before July 26, 1991.

6. THIS COURT FURTHER ORDERS that service of the said

Appendix A

Notice shall be effective on the fifth day after the last of such Notices are mailed.

7. THIS COURT FURTHER ORDERS that the cost of mailing the Notices shall initially be borne in equal proportions by the Pension Society and by the Applicants, that the Applicants shall forthwith reimburse the Pension Society for their share of such costs after the notices are mailed and that, upon the determination of this proceeding, the successful party or parties may recover their share of the expense from the unsuccessful party or parties, subject to the further order of the court.

8. THIS COURT FURTHER ORDERS that in all other respects this motion be adjourned to August 6, 1991.

s/
JUSTICE, ONTARIO COURT
(GENERAL DIVISION)

Appendix A

SCHEDULE "A"

Court File No. RE 785/91

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

BETWEEN:

ANDREW BATHGATE, CARL THOMAS BREWER, GORDON HOWE, ROBERT M. HULL, ALLAN HERBERT STANLEY, EDWARD SHACK, LEO CHARLES REISE.

Applicants

-and-

THE NATIONAL HOCKEY LEAGUE PENSION SOCIETY, THE MANUFACTURERS' LIFE INSURANCE COMPANY, JOHN ZIEGLER on his own behalf and on behalf of all member clubs comprising the National Hockey League, Boston Professional Hockey Association, Inc., Calgary Flames Hockey Club, Chicago Blackhawk Hockey Team, Inc., Detroit Red Wings; Inc., Edmonton Oilers Hockey Ltd., 8 Hockey Ventures, Inc., Hartford Whalers Hockey Club, Le Club De Hockey Canadien Inc., Le Club De Hockey Les Nordiques 1979, Societe En Commandite, L.A. Kings, Ltd., Maple Leaf Gardens Limited, Meadowlands, Inc., Nassau Sports, New York Rangers Hockey Club (A Division of Madison Square Gardens Centre, Inc.), Niagara Frontier Hockey, L.P., Northstar Hockey Partnership, Philadelphia Flyers Partnership Limited, Pittsburgh Penguins Inc., St. Louis Blues Hockey Club, L.P., Vancouver Hockey Club, Ltd. and Washington Hockey Limited Partnership.

Respondents.

Appendix A

IMPORTANT NOTICE

TO: All Player Participants (including former Player Participants) of the National Hockey Club Pension Plan (the "Pension Plan") and, in particular, to all those Player Participants with service under the Pension Plan on or before June 30, 1982.

This Application has been commenced in the Ontario Court (General Division) by Andrew Bathgate, Carl Brewer, Gordon Howe, Robert Hull, Allan Stanley, Edward Shack, and Leo Reise (the "Applicants"). In the Application, the Applicants seek a Declaration by the Court that the National Hockey League Pension Society ("the Pension Society") was required to allocate any surplus in the Pension Plan to the Applicants and other hockey players who are Player Participants or former Player Participants of the Pension Plan, with service under the Pension Plan on or before June 30, 1982, or to the Beneficiaries of such deceased Player Participants. Hereinafter, those Player Participants with service under the Pension Plan on or before June 30, 1982 and the Beneficiaries of such deceased Player Participants are referred to as the "Class Members".

The Application also seeks a Declaration that the Pension Society and the National Hockey League (the "NHL") and its member clubs ("the clubs") were not authorized at law to allocate any part of the surplus to the clubs or to use this surplus to finance subsequent obligations of the Pension Society, but were required to allocate all surpluses to the Class Members.

The Application further seeks an Order that the surpluses in the Pension Plan be allocated in their entirety to the Class Members.

Appendix A

At the initial hearing of this Application, the clubs and the Pension Society sought and obtained an Order appointing the Applicants to represent all Class Members and an Order appointing the Applicants as Representatives of the Class members with respect to the subject matter of this proceeding and not any statutory claims which may be raised under the laws of any other jurisdiction was made. As a result, any order made in this Application or any settlement reached with them will be binding on any person in the class the Applicants are representing: i.e. Player Participants in the Pension Plan with service under the Plan on or before June 30, 1982 and the Beneficiaries of any such deceased Player Participants. Notice of this Proceeding is being sent to all Player Participants of the Pension Plan, including Player Participants who only have service to their credit after June 30, 1982 or, in the case of such deceased Player Participants, to their Beneficiaries by Order of the Court. The clubs and the Pension Society have also applied to add a person designated by the NHL Players' Association as a representative party to the Proceeding to represent those Player Participants in the Pension Plan who are action members of the NHL Players' Association, and for other relief, and this matter has been adjourned until August 6, 1991.

IF YOU ARE A PLAYER PARTICIPANT OR FORMER PLAYER PARTICIPANT WITH SERVICE IN THE PENSION PLAN ON OR BEFORE JUNE 30, 1982, OR A BENEFICIARY OF SUCH A DECEASED PLAYER PARTICIPANT, AND YOU WISH TO PARTICIPATE ON YOUR OWN AS A PARTY TO THE PROCEEDING, you or any Ontario lawyer acting for you must make a motion to a judge under Rule 10.03 of the Rules of Civil Procedure for relief from the binding effect of the Order and/or leave to participate in the proceeding. By Order of the Court, notice is hereby given that anyone wishing to bring such a motion shall do so on or before July 26, 1991.

Appendix A

IF YOU ARE A PLAYER PARTICIPANT OR FORMER PLAYER PARTICIPANT BUT ONLY HAVE SERVICE AFTER JUNE 30, 1982 TO YOUR CREDIT, OR IF YOU ARE A BENEFICIARY OF SUCH A DECEASED PLAYER PARTICIPANT, AND YOU WISH TO PARTICIPATE ON YOUR OWN AS A PARTY TO THE PROCEEDING, you or any Ontario lawyer acting for you must make a motion to a judge under Rule 5.03 (4) and/or Rule 9.04 of the Rules of Civil Procedure for leave to participate in the proceeding. By Order of the Court, notice is hereby given that anyone wishing to bring such a motion shall to do so on or before July 26, 1991.

If you are presently a member of the National Hockey League Players' Association ("NHLPA") you may wish to consult with the NHLPA before making such a motion referred to in the two paragraphs above.

A copy of the Notice of Application and Order may be obtained from the court office or from the solicitors for the Applicants or Respondents. For further information contact:

Dated June 28, 1991.

LERNER & ASSOCIATES
Barristers & Solicitors
Box 95, Suite 2400
130 Adelaide Street West
Toronto, Ontario
M5H 3P5

Earl A. Cherniak, Q.C.
(416) 867-3076
Solicitors for the Clubs and
the Pension Society

KOSKIE and MINSKY
Barristers & Solicitors
481 University Avenue
Suite 800
Toronto, Ontario
M5G 2E9

Mark Zigler
(416) 977-8353
Solicitors for the
Applicants

Appendix A

BATHGATE et al. -and- THE NATIONAL HOCKEY LEAGUE PENSION SOCIETY et al.

Court File No.: RE 785/91

ONTARIO COURT OF JUSTICE (GENERAL DIVISION)
Proceeding commenced at

Toronto

ORDER

Earl A. Cherniak
LERNER & ASSOCIATES
Barristers & Solicitors
Box 95, Continental Bank
of Canada Building
Suite 2400
130 Adelaide Street West
Toronto, Ontario
M5H 3P5

(416) 867-3076

Solicitors for the Respondents

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, DATED MARCH 19, 1993.

Robert DAILEY; Reggie Leach, on behalf of themselves and all others similarly situated

v.

THE NATIONAL HOCKEY LEAGUE; The National Hockey League Pension Society; The Manufacturers Life Insurance Company; John Ziegler; Boston Professional Hockey Association, Inc.; Calgary Flames Hockey Club; Chicago Blackhawk Hockey Team, Inc.; Detroit Red Wings, Inc.; Edmonton Oilers Hockey, Ltd.; 8 Hockey Ventures, Inc.; Hartford Whalers Hockey Club; Le Club De Hockey Canadien, Inc.; Le Club De Hockey Les Nordiques; L.A. Kings, Ltd.; Maple Leaf Gardens Limited; Meadowlanders, Inc.; Nassau Sports; New York Rangers Hockey Club, a Division of Madison Square Garden Center, Inc.; Niagara Frontier Hockey, L.P.; Northstar Hockey Club; Philadelphia Flyers Limited Partnership; Pittsburgh Penguins, Inc., St. Louis Blues Hockey Club, L.P.; Vancouver Hockey Club, Ltd.; Washington Hockey Limited Partnership, Appellants.

No. 92-5156.

United States Court of Appeals,
Third Circuit.

Argued Sept. 21, 1992.

Decided Feb. 18, 1993.

Sur Petition for Rehearing
March 19, 1993.

Appendix B

Richard P. McElroy (Argued), Stephen M. Orlofsky, Ann B. Laupheimer, Jane C. Silver, Blank, Rome, Comisky & McCauley, Philadelphia,, PA, for all appellants except The manufacturers Life Ins. Co.

Daniel Segal, Claire Rocco, Hangley, Connoly, Epstein, Chicco, Foxman & Ewing, Philadelphia, PA, Steuart Thomsen, Sutherland, Asbill & Brennan, Washington, DC, for The Manufacturers Life Ins. Co.

Joseph H. Kenney (Argued), Mark Schwartz, Kenny & Kearney, Cherry Hill, NJ, Edwin T. Ferren, III, Richman & Ferren, David E. Ferguson, Haddonfield, NJ, for appellees.

Before: HUTCHINSON, ALITO and SEITZ, Circuit Judges.

OPINION OF THE COURT

SEITZ, Circuit Judge.

This is a permitted interlocutory appeal by defendants pursuant to 28 U.S.C. § 1292(b) from an order of the district court denying their motion to dismiss. The district court granted defendants' motion to certify the following question:

> Does the assertion by the plaintiff of a claim under ERISA over which there is exclusive jurisdiction in federal court preclude dismissal under the doctrine of *forum non conveniens* and likewise preclude dismissal based on lack of subject matter jurisdiction under *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 59 S. Ct. 275, 83 L.Ed. 285 (1939)?

Appendix B

I. Factual Background

This class action was instituted in the district court by a group of former hockey players ("Players" or "plaintiffs") in the National Hockey League ("NHL"). It was filed against the NHL; the National Hockey League Pension Society ("Pension Society"); the Manufacturers Life Insurance Company ("Manulife"); John Ziegler, the president of the NHL; and all member clubs of the NHL (collectively, the "League" or "defendants").

The Players alleged that the League breached the fiduciary duties it owed them as well as terms of the NHL Pension Plan and Trust Agreement ("trust" or "agreement"). They also alleged violations of various provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, involving the funding, administration, and management of the National Hockey League Pension Plan and Trust ("pension plan").

The NHL established a pension plan in 1947 and first embodied it in a written agreement in 1967.[1] It was amended several times between 1967 and 1986. Under the original agreement, both players and their respective member clubs were to make contributions to the plan. After the first amendment, players were no longer required to make contributions. Instead, the member clubs provided full funding for the plan. Funds in the plan were invested in a group annuity contract with defendant Manulife. It is the surplus generated under this contract and the League's treatment of it which forms the basis for the two suits.

The pension plan contained provisions which required that all

---

1. The plan, under United States tax law, is designated as a "foreign situs" trust. *See, e.g.*, 42 U.S.C.A. § 404(a)(4) (West Supp. 1992).

surplus funds generated by the plan be used solely for the benefit of the participating players and their beneficiaries. Any surplus generated was to be allocated to the participating players' accounts at five-year intervals. The plan also prohibited amendments of the agreement to the detriment of the participants prior to the satisfaction of all liabilities under the plan.

The League moved to dismiss this action for lack of subject matter jurisdiction based on the existence of a case pending in a Canadian court at the time this action was commenced. It also moved to dismiss on *forum non conveniens* grounds.

The Canadian action was made a "representative" action by the Canadian court (analogous to our class action). The Canadian class represents only those players who retired before July of 1982, whereas the class in this action includes those players who retired prior to 1988.[2] The defendants in both actions are identical except that the NHL is not named as a defendant in the Canadian action.

Although the claims asserted in the action before this court are based primarily on ERISA, whereas the clams in the Canadian action are based on Canadian law, both actions allege the same wrongdoing and seek similar relief.

The applicants (plaintiffs) in the Canadian action seek:

1. A declaration that all pension surpluses accruing between 1947 and December 9, 1983 are to be allocated among the plan participants and their beneficiaries.

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2. The parties make no point of this distinction in connection with arguments directed to the application of *Princess Lida*. We will do the same.

2. An order that the surpluses transferred to the member clubs and the Pension Society be allocated to the plan participants and their beneficiaries.

3. A declaration that the Pension Society and the NHL are in breach of their legal and fiduciary duties for their actions in contravention of the plan agreement relating to the use of and allocation of surplus.

4. A declaration that any amendments to the pension plan are null and void to the extent they allocate surplus to persons other than plan participants and their beneficiaries.

5. An order that the Pension Society allocate surplus currently held to the plan participants and their beneficiaries and that the member clubs make restitution of any shortfalls arising from their improper receipt of funds from the pension plan.

6. An accounting of funds allocated or to be allocated among the plan participants and their beneficiaries.

7. An order replacing the Pension Society as trustee and appointing a new trustee.

8. An award of costs on a solicitor-and-his-own-client basis.

As noted, the plaintiffs in this action seek essentially the same relief. No liquidated damages issue is involved in the present contest.

The district court denied the League's motion to dismiss. In doing so, it rejected defendants' argument that dismissal was warranted under the *Princess Lida* doctrine and on grounds of

forum on conveniens. Our review here under U.S.C. § 1292(b) is limited to questions of law raised by the order. *United States v. Stanley,* 483 U.S. 669, 677, 107 S Ct. 54, 3060, 97 L.Ed.2d 550 (1987); *Ivy Club v. Edwards,* 943 F.2d 270, 275 (3d Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S. Ct. 1282 7 L.Ed.2d 507 (1992). In deciding these questions, however, we are not constrained by the question certified, rather "we may address any issue necessary to decide the appeal before us." *Ivy Club,* 943 F.2d at 75 (citing *Morse/Diesal, Inc. v. Trinity Indus., Inc.,* 859 F.2d 242, 249 (2d Cir. 1988)). Because the Supreme Court in *Princess Lida* formulated its doctrine in terms of subject matter jurisdiction, we will first address that issue.

The principal certified question is whether the assertion of a claim under ERISA, which is subject to exclusive federal court jurisdiction, precludes dismissal under the *Princess Lida* doctrine. However, we think it is preferable to consider first whether *Princess Lida* is applicable without regard to ERISA. We proceed to that task.

II. Princess Lida

In *Princess Lida,* trustees of a fund in which Lida and her sons were beneficiaries brought an accounting action in the Common Pleas Court of Fayette County, Pennsylvania. Thereafter, Lida and one of her sons brought suit in the district court allegating that the trustees had mismanaged the trust funds and praying for a removal of the trustees and a restortion of corpus. *Princess Lida v. Thompson,* 305 U.S. 456, 458-60, 59 S.Ct. 275, 277-78, 83 L.Ed. 285 (1938). The Supreme Court held that the earlier accounting action was *quasi in rem* and that the district court lacked subject matter jurisdiction. *Id.* at 465-68, 59 S.Ct. at 280-81. This holding was based on the doctrine which prevents a court in which an

action is filed from exercising jurisdiction when a court in a previously filed action is exercising control over the property at issue and the second court must exercise control over the same property in order to grant the relief sought. As the Court said in *Princess Lida:*

> We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized . . . but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property.

Id. at 466, 59 S.Ct. at 280 (footnote and citations omitted). Our future reference to the *Princess Lida* doctrine will embrace only the quoted language of the opinion.

The quoted principle of *Princess Lida* was well established in prior Supreme Court precedents. *See United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463, 477-78, 56 S.Ct. 343, 347-48, 80 L.Ed. 331 (1936); *Penn Gen. Casualty Co. v. Pennsylvania,* 294 U.S. 189, 195, 55 S.Ct. 386, 389, 79 L.Ed. 850 (1935). Its continuing validity is undisputed. *See Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 818, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976) (citing *Princess Lida,* among other cases, and stating that "[a] court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts"); *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 66 (2d Cir. 1991)

(stating, in an *in rem* context, that the rule of *Princess Lida* is "equally applicable to requested interference by American courts with a res under the jurisdiction of a foreign court").

The district court recognized that "the instant actions do involve the administration of a trust" but then went on to conclude that "every suit that involves the administration of a trust fund does not invoke the *Princess Lida* doctrine" and that the doctrine was inapplicable in this case. *Dailey v. National Hockey League*, 780 F.Supp. 262, 267 (D.N.J. 1991). This conclusion was based, in part on the court's determination that the suit brought in *Princess Lida* required "far more comprehensive control by the court over the administration of the trust than is sought in the cases at issue here." *Id.* In finding *Princess Lida* inapplicable, the district court concluded that the two actions, to the extent they sought money damages from their third parties, specifically the member clubs and Manulife, were *in personam* actions. *Id.* at 267-68. The district court, applying what it termed a "pragmatic" approach, concluded that, despite the fact that injunctive relief is sought in both suits, there was no danger of conflicting orders arising between the two courts and therefore it was unnecessary to apply the doctrine in this case. *Id.* at 268. The court reached this conclusion by relying on its view that a decision in the Canadian action would be rendered "well before this court has reached a stage at which we could consider ordering relief." *Id.* The court stated "[w]e will therefore have the benefit of knowing what relief has been ordered by the Canadian court and will be able to tailor our own order accordingly." *Id.*

We find that the district court's approach is flawed at the outset. *Princess Lida* is a "mechanical rule" which requires that the court in which the second suit is brought yield its jurisdiction if the requisite "property" showing is made. *See PPG Indus., Inc. v.*

Continental Oil Co., 478 F.2d 674, 677 (5th Cir. 1973) (stating that *Princess Lida* is a "virtually mechanical *in rem* rule"); *Crawford v. Courtney*, 451 F.2d 489, 492 (4th Cir. 1971) (stating that *Princess Lida*-type abstention is "compulsory," not discretionary); *Ewald v. Citizens Fidelity Bank & Trust Co.*, 242 F.2d 319, 322 (6th Cir. 1957) (stating that where *Princess Lida* applies the court where the action is first filed has "exclusive jurisdiction, and the federal court [has] no right to interfere with the pending litigation"). Thus, the district court erred in justifying its jurisdictional decision by reliance in part on future developments.[3] That approach would leave the subject matter jurisdiction of the district court in a judicial limbo.

Princess Lida applies when: (1) the litigation in both the first and second fora are *in rem* or *quasi in rem* in nature, and (2) the relief sought requires that the second court exercise control over the property in dispute and such property is already under the control of the first court. *Princess Lida v. Thompson*, 305 U.S. at 466, 59 S.Ct. at 280.

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3. The district court relies, in part on *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980) in its discussion of ERISA and *Princess Lida*. Though the district court does not appear to rely on *Levy* in adopting its discretionary approach to the application of *Princess Lida*, it may have read language in *Levy* as establishing such an approach. *See Levy*, 635 F.2d at 965-66 (stating that "[*Princess Lida*] is more accurately described as a prudential doctrine in which a second court with concurrent jurisdiction will exercise its discretion to defer to another court. . . . "). This language is inconsistent with earlier Second Circuit precedent which establishes that *Princess Lida* is not a discretionary doctrine. *See Beach v. Rome Trust Co.*, 269 F.2d 367, 371 (2d Cir. 1959) ("[*Princess Lida*] requires a federal court to dismiss any claim with regard to the property where the adjudication would interfere with the proceedings in [another] court. . . . This principle is so firmly rooted in our law as to have required and not merely permitted [dismissal]." (citations omitted)).

Appendix B

As to the first requirement, the parties tacitly agree that the actions are not *in rem*. However, both actions, in part, involve the "administration and restoration of corpus" and are not "merely an adjudication of [a party's] right or . . . interest" nor "strictly in personam." *Id.* at 466-67, 59 S.Ct. at 280-81. They intimately involve the validity of terms of the pension plan and their general application to the trust funds. We, therefore, conclude that the actions are *quasi in rem* within the meaning of *Princess Lida*. *See Shaw v. First Interstate Bank of Wis., N.A.*, 695 F.Supp. 995, 999 (W.D.Wis.1988) (stating that the phrases *in rem* and *quasi in rem* are "of little use by themselves in determining [jurisdiction.] The important question is whether th[e] action falls within the term *quasi in rem* as it was used by the U.S. Supreme Court in *Princess Lida*"). The primary relief sought in both actions is the restoration of trust funds which were allegedly misappropriated. This is precisely the situation which was at issue in *Princess Lida* and which the court stated was encompassed within the term *quasi in rem*. *See In re Solar Mfg. Corp.*, 200 F.2d 327, 332 (3d Cir. 1952) (stating that an action for the restoration of trust funds is *quasi in rem*), *cert. denied*, 345 U.S. 940, 73 S.Ct. 831, 97 L.Ed. 1366 (1953). We therefore turn to the question of whether the claims are essentially the same.

The applicants in the Canadian suit seek both restoration of corpus and injunctive relief prohibiting the continued improper use of surplus funds and requiring proper allocation of the diverted funds by the pension fund. They also seek an accounting and removal of the trustee. Similar relief is sought by the plaintiffs in this case. Thus, the relief sought in the district court at the time the action was filed would require the district court to exercise control over the same property that is subject to the control of the Canadian court as well as requiring it to determine the future status of the incumbent Canadian trustee. To us, this is assuredly the type of

legal disharmony the *Princess Lida* Court sought to avoid. Having found that both requirements are met, we conclude that the district court "must yield" its jurisdiction,[4] unless ERISA dictates otherwise. We address the frontier issue.[5]

III. Impact of ERISA

The district court based its decision, in part, upon its conclusion that application of the *Princess Lida* doctrine would result in the loss of plaintiffs' ERISA claims,[6] claims which are subject to the exclusive jurisdiction of the United States federal courts.

The district court relied primarily on *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980), for the proposition that *Princess Lida* is

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4. Since this appeal was argued, the Canadian trial court has granted essentially all the relief requested in that action except the removal of the trustee. We are advised that there will be an appeal. Thus, the Ontario Court of Justice declared that "[a]ll excess Plan funds . . . are to be allocated exclusively among the applicable participants to purchase for them additional pension benefits[.]" *Bathgate v. National Hockey League Pension Soc'y*, 1992 Ont.C.J. LEXIS 1830, at *186 (Oct. 21, 1992). The court ordered that an accounting be made and that the action be referred to a master who would determine "the actual amount of excess funds . . . and the manner and timing of distribution of such funds. . . ." *Id.* at *188. Though we have reached our decision in this case by looking to what was sought in the Canadian action, the same conclusion would follow from looking to the relief which was granted by the Ontario Court of justice. Despite that decision, both sides press us to decide this appeal.

5. Both parties concede that the ERISA claims, as such, cannot be tried in the Canadian action.

6. Plaintiffs alleged that defendants' conduct was a breach of the fiduciary duty owed them under ERISA, 29 U.S.C. § 1104 and violated the exclusive use provisions of 29 U.S.C. § 1103(c)(1).

inapplicable when dismissal would result in the loss of ERISA claims which are subject to the federal courts exclusive jurisdiction.

The district courts reliance on *Levy* is misplaced. In *Levy*, the court found that abstention as to certain ERISA claims which were subject to concurrent federal and state jurisdiction was appropriate under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).[7] It was in this context that the Second Circuit cited *Princess Lida*. Though the court went on to conclude that abstention was inappropriate as to additional ERISA claims which were subject to the exclusive jurisdiction of the federal courts, this discussion was limited to abstention under *Younger* [*v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)] and *Colorado River*. *Levy*, 635 F.2d at 967 ("The ability to raise federal claims in state proceedings has always been a prerequisite to *Younger* abstention, and it is clear as well that abstention for purposes of judicial economy under *Colorado River* applies only where concurrent federal-state jurisdiction exists."). The court's conclusion in *Levy*, based on discretionary abstention doctrines, has no application to the question of the district court's jurisdiction under the mandatory rule of *Princess Lida*.

Relying on the exclusive jurisdictional provisions of ERISA, the district court concluded that "plaintiffs' ERISA claims would be lost if they were forced to press their grievances only before a

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7. In *Colorado River*, the Supreme Court noted that in limited circumstances where two courts are contemporaneously exercising concurrent jurisdiction abstention is appropriate for "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* 424 U.S. at 817, 96 S.Ct. at 1246 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952)).

Canadian Court, and . . . such loss could be of material significance to plaintiffs' case." *Dailey,* 780 F.Supp. at 271. It concluded that this consequence, in conjunction with its finding that the actions were not *in rem* or *quasi in rem* within the meaning of *Princess Lida,* did not compel dismissal under *Princess Lida. Id.*

We observe as a preliminary matter that we are not involved with the continuing viability of the *Princess Lida* doctrine in a situation involving ERISA and concurrent proceedings in two United States' courts. We are, however, concerned with the continuing applicability of that doctrine in a *quasi in rem* context where a district court has jurisdiction but a foreign court also has jurisdiction to entertain claims over the same alleged wrongdoing and can grant similar relief. We have been unable to find any caselaw, other than the district court's opinion in this case, addressing this issue in a *Princess Lida* context.

The considerations that dictate the proper result are far from clear. In conducting our analysis we recognize the strong public policy reflected in ERISA designed to protect pension rights. however, the potential for conflicting determinations clearly exists here as to some aspects of the "property" issues involved. This possibility calls into play the considerations that in part prompted the formulation of the *Princess Lida* doctrine. We therefore conclude that ERISA does not negate the continuing applicability of *Princess Lida* under the present facts.

We believe our determination is consistent with decisions of other courts that have upheld the dismissal of claims subject to the exclusive jurisdiction of the federal courts. In *Howe v. Goldcorp Investments, Ltd.,* 946 F.2d 944, 952 (1st Cir.1991), *cert. denied,* __ U.S. __, 112 S.Ct. 1172, 117 L.Ed.2d 418 (1992), the court upheld the district court's dismissal of plaintiffs private securities law action against a Canadian corporation under the doctrine of

forum non conveniens despite the fact that these claims were subject to the exclusive jurisdiction of the federal courts. The court stated that "Canadian courts will either apply American law . . . or they will apply Canadian laws that offer . . . somewhat similar protections. . . ." *Id.* In reaching this conclusion that court relied on Supreme Court precedent which requires that the "possibility of an unfavorable change in law" not be considered unless "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254, 102 S.Ct. 252, 265, 70 L.Ed.2d 419 (1981). *See Lockman Found. v. Evangelical Alliance Mission,* 930 F.2d 764, 768-69 (9th Cir. 1991) (relying on *Piper* and stating that the possible loss of statutory claims (RICO and Landham Act) did "not furnish a sufficient reason to preclude dismissal").

The district court, in its discussion of *forum non conveniens,* found that the "uniqueness of plaintiffs' ERISA claims" made *Howe* inapplicable. *Dailey,* 2780 F.Supp. at 272. We find *Howe* to be persuasive in its treatment of the loss of claims subject to the exclusive jurisdiction of the federal courts and we think its approach is equally applicable to the question of dismissal under the *Princess Lida* doctrine. We say this because it is difficult to see how dismissal could be possible under *forum non conveniens* but at the same time not an available remedy under *Princess Lida.*

Given our conclusion, the certified question requires us to go no further at this point. Our conclusion also renders its unnecessary to consider the certified question dealing with the *forum non conveniens* ruling of the district court.

The order of the district court will be reversed.

ALITO, Circuit Judge, dissenting.

Appendix B

It is undisputed that ERISA was meant to govern the National Hockey League's pension plan. The majority, however, relying on what it forthrightly describes as " 'mechanical' " application of the *Princess Lida* doctrine,[1] has prevented the plan's beneficiaries from seeking to enforce some of their ERISA rights. Instead, the majority in effect holds that the beneficiaries must rely entirely on Canadian law. I do not believe that the *Princess Lida* doctrine dictates such a result.

The *Princess Lida* doctrine was developed to prevent conflicts between courts in this country. In *Princess Lida* itself, the Court observed that "[t]he doctrine is necessary to the harmonious cooperation of federal and state tribunals. 305 U.S. 456, 466, 59 S.Ct. 275, 280, 83 L.Ed. 285 (1939). *See also United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477-78, 56 S.Ct. 343, 347-48, 80 L.Ed. 331 (1936); *Penn Gen. Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195, 55 S.Ct. 386, 389, 79 L.Ed. 850 (1935). When the doctrine is applied in that context, federal statutory rights are not eradicated.

The majority in this case has applied the *Princess Lida* doctrine in an entirely different context and in doing so has abrogated federal statutory rights. Neither the majority nor the appellants have cited any precedent supporting such a result.[2]

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1. Majority at 176, quoting *PPG Indus. Inc. v. Continental Oil Co.*, 478 F.2d 674, 677 (5th Cir. 1973).

2. In support of the proposition that the *Princess Lida* doctrine applies to conflicts between an American court and a foreign court, the majority cites one case, *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 66 (2d Cir. 1991), but I believe that *Chesley* is very different from the present case.

Chesley grew out of the release of a toxic chemical from a pesticide plant in

(Cont'd)

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The appellants contend that the loss of the plaintiffs' ERISA rights is insignificant because Canadian law "provides protections similar to those provided by U.S. Law." Appellants' brief at 25. In my view, however, it makes no difference whether Canadian law is similar to or even in some sense better than ERISA. What matters is that Congress wanted ERISA to govern the NHL pension plan, but the majority has frustrated the implementation of that intent.

I think that the district court's approach is preferable to a mechanical application of the *Princess Lida* doctrine. The district court proposed to retain jurisdiction and adjudicate the plaintiffs'

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Bhopal, India, that resulted in thousands of deaths and injuries. Suits against Union Carbide were filed in India and in this country, but the suits in this country, which were consolidated in the Southern District of New York, were dismissed on the ground of *forum non conveniens*. *Id.* at 61. After the Indian litigation was settled and the settlement funds were placed under the supervision of the Supreme Court of India, the attorneys who had filed suit in this country moved in the Southern District of New York for attorneys' fees and expenses. The district court dismissed these claims, and the court of appeals affirmed. The court of appeals held that the prior *forum non conveniens* dismissal did not automatically preclude the district court from exercising ancillary jurisdiction but that exercise of such jurisdiction would have constituted an abuse of discretion because it would have interfered with the supervision of the settlement fund by the Supreme Court of India. It was in this context that the court of appeals stated that the *Princess Lida* doctrine applies to "requested interference by American courts with a res under the jurisdiction of a foreign court." *Id.* at 66.

In my view, the holding in *Chesley* means that a district court, in determining whether to exercise ancillary or "supplemental" jurisdiction (28 U.S.C. § 1367 (West Supp. 1992)), should carefully consider whether doing so would interfere with a foreign court's jurisdiction over a res. I do not believe that *Chesley* stands for the proposition that the *Princess Lida* doctrine automatically dictates dismissal of an action in a United States court even if the result will be the loss of important federal statutory rights.

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ERISA claims but to monitor developments in the Canadian litigation and address any real conflicts concerning the administration of the plan if they arose. *See Dailey v. National Hockey League,* 780 F.Supp. 262, 268 (D.N.J. 1991). This approach accommodates the principle of comity underlying the *Princess Lida* doctrine without sacrificing the plaintiffs' ERISA rights.[3] Because I agree with the district court's decision, I respectfully dissent.[4]

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3. As the majority notes (Majority at 177 n.4), after this appeal was argued, the Canadian trial court issued a decision granting much of the relief that the plaintiffs in this case requested. Because this decision has been appealed and accordingly may be reversed in whole or part, I agree with the majority and with both sides that the Canadian trial court decision does not fundamentally alter the question before us.

4. In addition to refusing dismissal based on the *Princess Lida* doctrine, the district court also refused to dismiss on the ground of *forum non conveniens.* Applying the standards set out in *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), and related decisions of this court, I would sustain the district court's decision on the *forum non conveniens* question.

Appendix B

SUR PETITION FOR REHEARING

Present: BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and SEITZ,* Circuit Judges.

HUTCHINSON, Circuit Judge.

The petition for rehearing filed by appellees in the above captioned matter having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Alito would grant in banc rehearing.

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* Hon. Collins J. Seitz, United States Circuit Judge, was limited to voting for panel rehearing.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY DATED DECEMBER 30, 1991

Robert DAILEY and Reggie Leach, on Behalf of Themselves and all Others Similarly Situated, Plaintiffs,

v.

The NATIONAL HOCKEY LEAGUE, et al., Defendants.

Civ. No. 91-2564.

United States District Court,

D. New Jersey.

Dec. 30, 1991.

J. Philip Kirchner, Kenney & Kearney, Cherry Hill, N.J., Edwin T. Ferren, III, Richman & Ferren, David E. Ferguson, Haddonfield, N.J., for plaintiffs.

Stephen Orlofsky, Blank, Rome, Comisky & McCauley, Cherry Hill, N.J., for NHL defendants.

Claire Rocco, William T. Hangley, Hangley Connolly Epstein Chicco Foxman & Ewing, Philadelphia, Pa., Stuart H. Thomsen, Sutherland Asbill & Brennan, Washington, D.C., for defendant the Manufacturers Life Ins. Co.

OPINION

GERRY, Chief Judge.

Plaintiffs, two former professional hockey players, filed this class action lawsuit on June 6, 1991, alleging violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, in connection with the funding, administration, and

management of the National Hockey League Pension Plan and Trust. Defendants are the National Hockey League (NHL), the National Hockey League Pension Society, the Manufacturer's Life Insurance Company ("Manulife"), and numerous member clubs of the NHL.

All defendants have moved to dismiss on the grounds that another previously filed lawsuit addressing the same issues is now pending in Canada. Defendants cite three legal doctrines which they argue compel this court to relinquish juridiction over this action and leave the matter to be resolved by the Canadian court: 1) the *Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1939) doctrine, 2) the *forum non conveniens* doctrine, and 3) the *Colorado River Water Conservation District v. U.S.,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) abstention doctrine. Plaintiffs argue that dismissal is inappropriate under all three doctrines, primarily because ERISA is subject to the exclusive jurisdiction of the United States District Courts.[1] For the reasons set forth below, defendants motions to dismiss are denied.

I. PLAINTIFFS' CLAIMS

The NHL pension plan has been in existence since 1947, but in

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1. 29 U.S.C. § 1132(e)(1) of ERISA states:

> Except for actions under subsection (a)(1)(B) of this section [to recover benefits due under the plan, to enforce rights under the plan, or to clarify rights to future benefits under the plan], the district courts of the United States shall have exclusive jurisdiction of civil actions under this title. . . .

Appendix C

1967 its terms and conditions were set down in a document called the National Hockey League Club Pension Plan and Trust Agreement (the "1967 Agreement") which designated the NHL Pension Society as trustee of the Pension Plan and Trust. Until 1986, the Pension Society invested substantially all of the funds under the plan in a group annuity contract with defendant Manulife. Under this contract, to the extent that Manulife was able to earn a rate of return on the funds deposited in excess of the internal rate of return on which the contract was based, "surplus funds" would be generated.

The 1967 agreement contained a provision directing that surplus funds generated by the plan were to be used solely for the benefit of participating players and were to be allocated to their accounts on a regular basis at five year intervals. It also contained several clauses stating that all funds and assets of the Pension Plan and Trust were to be used for the exclusive benefit of plan participants and their beneficiaries, as well as a clause prohibiting amendment of the agreement in any way that would vitiate or contradict the exclusive benefit provision. In accordance with this agreement, surplus funds existing as of April 30, 1967 were allocated to participating players.

In 1972 the agreement was amended and restated in the "First Restated Agreement," purporting to be effective retroactive to May 1, 1969. The exclusive benefit provisions and the prohibition on amendments remained unchanged from the 1967 Agreement. The only relevant changes made were the provision of two additional allocations of surplus funds from the Pension Plan and Trust to participants as of April 30, 1968 and April 30, 1969. These allocations were subsequently made in accordance with the amended agreement. In 1977 the agreement was amended again, but no relevant changes were made.

Appendix C

Although under the then existing Agreement as amended, additional allocations of surplus should have been made as of 1972 and 1977, no such allocations were made, despite the fact that substantial surplus funds were accruing in the fund at that time. In 1982 an agreement was reached between Manulife and the NHL Pension Society, whereby Manulife agreed to disgorge approximately $2,993,000.00 of surplus funds from the Pension Plan and Trust to the Pension Society. The Pension Society allocated approximately one million dollars of this surplus to the accounts of retired participants in the pension plan; but the remaining approximately $1,993,000.00 was refunded to member clubs and the NHL and was removed altogether from the Pension Plan and Trust. No notice was given to participants of this diversion of plan assets to the benefit of the NHL and member clubs.

In 1983 yet another amendment was made, the "First Amendment to the Second Restated Agreement," which purported to be effective retroactively to January 1, 1982. Although this amendment did not alter the provisions of the agreement providing that all funds be used solely and exclusively for the benefit of plan participants and beneficiaries, it did provide that present and future surplus funds were to be allocated to the NHL and the member clubs as well as plan participants, each allocation to be made in proportion to the contributions made to the plan by that recipient Plaintiffs contend that this provision and the 1982 diversion of funds violated the 1967 agreement and subsequent amendments in that it provided for the use of funds under the plan other than for the benefit of participants and their beneficiaries.

The next significant amendment was executed in 1987, the "Fourth Restated Agreement," purporting to be effective retroactively to July 1, 1986. This amendment effectively

converted the Pension Plan and Trust from a defined benefit pension plan into a defined contribution pension plan. Thus, all benefits accruing to participants under the plan as of the effective date were to be in the form of defined contributions allocated specifically to individual accounts.

Around the same time, the Pension Society, the NHL, and the member clubs made an agreement with Manulife; whereby Manulife agreed to refund an additional twenty-four million dollars in surplus funds that had previously accrued in the Pension Plan and Trust, in exchange for the Pension Society's agreement to allow Manulife to convert the pension fund from a participating to a non-participating group contract such that surplus funds would no longer be generated under the plan. No notice of this agreement was given to plan participants, and of the twenty-four million dollars refunded to the Pension Society, less than four and a half million-dollars were allocated to the accounts of retired participants of the plan. Approximateiy sixteen and a half million dollars were allocated to the accounts of member clubs. Plaintiffs claim that these actions violated various provisions of ERISA, specifically: §§ 404, 409, 29 U.S.C. §§ 1104, 1109, imposing fiduciary duties with respect to the management of pension funds; and § 403(c)(1), 29 U.S.C. § 1103(c)(1), prohibiting inurement of the assets of a plan to the benefit of an employer. Plaintiffs' complaint also includes state law breach of contract and breach of fiduciary duty claims.

Plaintiffs request the following relief: 1) an injunction prohibiting defendants from removing any more surplus funds from the pension plan and prohibiting defendants from executing any further amendments that are inconsistent with the 1967 Agreement; 2) an order directing defendants to provide to plaintiffs an accounting of all surplus funds generated by the plan

since its inception and directing that all such funds be returned to the plan and allocated to plaintiffs' accounts; 3) an order directing defendants to reconvert the contract with Manulife from a non-participating to a participating contract, to allocate all surplus funds earned by such contract in the future to plaintiffs' accounts, and directing Manulife to account to the pension fund for all income and/or surpluses generated by the fund since its conversion from a participating to a non-participating contract in 1986 and to return all such income and surplus funds to the pension fund; 4) an order removing the NHL Pension Society as trustee of the fund and appointing a new trustee or trustees; 5) an award of money damages for defendants' breach of contract and fiduciary duty, and 6) an award of attorneys fees under ERISA § 502(g)(2)(D), 29 U.S.C. § 1132(g)(2)(D).

II. THE CANADIAN LAWSUIT

On April 26, 1991, before the filing of this suit, seven retired hockey players (not including the plaintiffs in this suit) filed a similar suit in the Ontario Court of Justice. The defendants in that suit are the same as in this suit except that the NHL is not named. That suit has been made, by stipulated order of the Ontario court, a "representative action" — analogous to our class action— with the plaintiff class consisting of all player participants with service under the pension plan on or before June 30,1982 and their beneficiaries.[2] The plaintiffs' claims allege breach of contract and breach of fiduciary duty under Canadian common law.

Plaintiffs seek relief substantially similar to what is requested in the case before us, including: 1) an order directing that all

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2. In contrast, plaintiffs in our suit seek to represent a class of all those who were participants and beneficiaries under the plan through December 31, 1987.

surplus funds generated by the pension fund and withdrawn by defendants be returned to the fund and allocated among the participating players and beneficiaries; 2) a declaration that the Pension Society and the NHL are in breach of their legal and fiduciary duties to the plan participants and beneficiaries; 3) a declaration that all amendments to the 1967 Agreement are null and void to the extent that they purport to allocate surplus funds to persons other than participating players and their beneficiaries; 4) an accounting of monies allocated or to be allocated among plan participants and beneficiaries; and 5) an order removing the NHL Pension Society' as trustee and appointing a new trustee.

III. THE PRINCESS LIDA DOCTRINE

The *Princess Lida* doctrine holds that where two suits filed in separate courts are "*in rem* or *quasi* in *rem*, so that the court . . . has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought," the court in which the suit was filed later must relinquish its jurisdiction and allow the case to proceed solely in the first court *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466; 59 S.Ct. 275, 280, 83 L.Ed. 286 (1939). On the other hand, "where the judgment sought [in one court] is strictly *in personam*, both [courts], having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other." *Princess Lida*, 305 U.S. at 466, 59 S.Ct. at 280.

Although *Princess Lida* involved concurrent actions in federal and state courts, the doctrine also applies where a suit has been previously filed in a foreign tribunal. *See Chelsey v. Union Carbide Corp.*, 927 F.2d 60, 66 (2d Cir.1991). Defendants, however, have not cited any cases in which the doctrine was

applied to dismiss ERISA claims. Plaintiffs argue that *Princess Lida* should not apply here, first, because this is an ERISA action and Congress has explicitly made the United States federal courts' jurisdiction in ERISA cases exclusive, and second, because neither court need exercise quasi in rem jurisdiction to adjudicate the claims advanced. We will address the second of these issues first.

A. *Quasi in Rem Jurisdiction and the Danger of Conflicting Orders*

The *Princess Lida* doctrine arises out of a practical concern for avoiding situations in which two courts issue conflicting orders with respect to the same property. Clearly such conflict arises where both courts exercise *in rem* jurisdiction with respect to the same *res*. Similar conflicts may arise in cases in which the court's jurisdiction is not technically *in rem*, but where adjudication of the claims requires two courts to exert control over the same property. In such cases the courts' jurisdiction is said to be *quasi in rem*. The *Princess Lida* case itself involved *quasi in rem* jurisdiction over a trust fund, and the Court stated that "suits brought . . . to administer trusts" were generally subject to the doctrine. *Id* at 466, 59 S.Ct. at 280.

Certainly the instant actions do involve the administration of a trust. Yet the particular "suit brought to administer a trust" described in the *Princess Lida* opinion apparently required far more comprehensive control by the court over the administration of the trust than is sought in the cases at issue here. That suit was an accounting action filed by the trustee in which

> the court [had] the power to fix the compensation of the trustee, to require him to take over from the trust investments

> improperly made and to restore the amount expended for them to the trust estate, to surcharge him with losses incurred, to allow him his proper expenses, to find against him a balance due the estate, and to make the balance found due a lien upon his real estate.

Id. at 464, 59 S.Ct. at 279. In such a suit, every aspect of the administration of a trust was apparently supervised and overseen by the court. In contrast, here and in the Canadian action, plaintiffs seek court involvement only with respect to certain limited aspects of the adminstration of the trust, relating specifically to the diversion of surplus funds.

Clearly every suit that involves the administration of a trust fund does not invoke the *Princess Lida* doctrine. At least one district court has held that an ERISA case in which the diversion and misappropriation of pension funds were alleged, constituted an *in personam* suit and was thus not subject to the *Princess Lida* doctrine. *See Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671, 674 (7th Cir.1979) (quoting district court opinion). The Tenth Circuit also declined to apply *Princess Lida* to a federal (non-ERISA) suit involving the administration of a trust in *Southwestern Bank & Trust Co. of Oklahoma v. Metcalf State Bank*, 525 F.2d 140 (10th Cir.1975). There a federal suit was brought by bondholders against the trustee of a trust seeking damages for breach of fiduciary duty, and a state court action to liquidate the property subject to the trust had been previously filed. The Tenth Circuit found that the state court action was "clearly *in rem*," *id.* at 142, but that the federal court action — which consisted of damages claims "relat[ing] entirely to the administration of the trust by the defendant trustee, and the performance of its obligations as trustee under the trust instruments," *id.* — was *in personam* and thus did not require the application of *Princess Lida.*

Appendix C

With respect to damages claims involving the administration of trusts, an important distinction can be made between situations where two concurrent lawsuits involve damages claims against the trust fund itself, and situations where one or both of the suits seek damages against third parties. Clearly in the first instance, conflict is likely to arise since both courts may seek to allocate funds from the same finite pool. Both courts will need to control the trust in order to adjudicate the claims before them, jurisdiction can thus be said to be *quasi in rem,* and *Princess Lida* applies. *See Levy v. Lewis,* 635 F.2d 960, 966 (2d Cir.1980). In the second instance, however, where damages are not sought against the trust itself, the claims are simply in the nature of *in personam* damages claims, which are not subject to the *Princess Lida* doctrine. The two suits at issue here, to the extent they seek monetary relief, clearly fall into the second category. Rather than seeking to obtain a share of the funds in the trust itself; plaintiffs in both suits seek to force third parties (the member clubs and Manulife) to restore to the fund monies which they allegedly illegally removed therefrom.

To the extent that plaintiffs request injunctive relief relating to the future administration of the trust, the question of whether *Princess Lida* applies is somewhat more difficult. In *Southwestern Bank,* the Tenth Circuit explicitly limited its holding to damages claims, indicating that *Princess Lida* would have applied had the federal suit also sought injunctive relief, such as the removal of the trustee. *See Southwestern Bank,* 525 F.2d at 143. Despite this dicta from the Tenth Circuit, however, we are inclined to hold that plaintiffs' claims for injunctive relief do not mandate application of *Princess Lida* to this case. In reaching this conclusion, we look behind the abstract and malleable term, "*quasi in rem,*" to the practical purpose which the *Princess Lida* doctrine serves: the avoidance of conflicting and irreconcilable orders from different courts. Applying this pragmatic standard to the situation before us,

we find that the danger of conflicting orders being issued by this court and the Canadian court has been substantially overstated by defendants.

The relief sought in these two lawsuits, though based partly on different legal theories; is admittedly quite similar. Both seek the removal and replacement of the trustee, and both seek an accounting of surplus funds generated by the fund. It is conceivable, therefore, that inconsistent obligations could be placed on the parties by the two courts if they were to act on these requests for relief simultaneously. The two courts might, for example, each order that the trustee be replaced by different entities.

Given the current posture of the two lawsuits, however, it seems virtually certain that a decision will be rendered in the Canadian action well before this court has reached a stage at which we could consider ordering relief. We will therefore have the benefit of knowing what relief has been ordered by the Canadian court and will be able to tailor our own order accordingly. To the extent that the Canadian court does order the relief requested by plaintiffs in that action, the concurrent requests for relief in this action will most likely be rendered moot. Thus, if the Canadian court removes and replaces the NHL Pension Society as trustee, plaintiffs' request that this court remove the Pension Society as trustee will certainly become moot. If the Canadian court orders an accounting of the surplus funds removed from the trust, the results of those calculations may well have preclusive effect in this action. Of course, to the extent the Canadian court declines to order the relief requested, no danger of conflicting orders will be present.

Certainly, when and if this court does reach the stage of considering whether to order the relief requested, defendants will

be free to alert us to any dangers of conflict with any Canadian order that may exist, and advise us against ordering any relief that might impose conflicting obligations on the parties. The court would welcome such arguments at that time. At this stage in the litigation, however, the potential danger of conflicting judgments appears minimal.

B. *The Federal Courts' Exclusive Jurisdiction over ERISA*

The fact that plaintiffs bring claims under ERISA as to which the United States federal courts have exclusive jurisdiction, also weighs against application of the *Princess Lida* doctrine to this case. Although it appears that no court has addressed this exact issue previously, a few opinions offer some guidance.

The Second Circuit has held, in a case involving concurrent federal and state court actions, that the federal courts' exclusive jurisdiction over certain ERISA claims precludes the dismissal of such claims by federal court, despite the presence of factors that would otherwise weigh strongly in favor of dismissal under the *Princess Lida* and *Colorado River* doctrines. *See Levy v. Lewis*, 635 F.2d 960 (2d Cir.1980).[3] Similarly, in *Central States Southeast*

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3. Indeed, *Levy* presented considerably stronger arguments for application of the *Princess Lida* doctrine than the instant case. It involved a federal ERISA action filed by former employees of an insurance company that was simultaneously undergoing liquidation proceedings in state court pursuant to state insurance laws. Thus, both actions involved claims brought against a single finite fund or pool of assets of an insolvent company. The case presently before us, in contrast, involves claims against solvent entities which are alleged to have wrongfully diverted money from a fund and are asked to return that money to the fund; it is more in the nature of a damages action.

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and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co., 600 F.2d 671 (7th Cir.1979), where a federal ERISA action was proceeding simultaneously with a state court liquidation proceeding under the state insurance regulation laws, the Seventh Circuit held that while "[p]rotecting the integrity of state insurance insolvency proceedings, and concern for their freedom from outside interference, are of great importance [. . . the state law governing such proceedings] cannot be interpreted as precluding a party from pursuing a congressionally created federal claim in the only courts able to provide affirmative relief on that claim." *Id* at 677.

Both of these courts based their reasoning on the fact that state courts are unable to hear ERISA claims, so that if the federal claims were dismissed, "the right[s] alleged would never be fully adjudicated." *Levy*, 635 F.2d at 967. Here, the prior-filed action is in a foreign tribunal rather than a state court, but it seems clear that it is equally impossible for the Canadian court to hear plaintiffs' ERISA claims as such. The language of the statute clearly states that only *United States* District Courts hear such claims,[4] and no

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(Cont'd)
Additionally, the *Levy* case involved factors strongly favoring abstention under the *Burford* and *Younger* doctrines, but the court considered its exclusive jurisdiction over ERISA claims an important enough consideration to preclude application of these doctrines as well.

4. Defendants argue that some of plaintiffs ERISA claims fall within the exception to the exclusive jurisdiction provision for claims brought under 29 U.S.C. § 1132(a)(1)(B) "to recover benefits due to [a participant or beneficiary] under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan," and that therefore, since plaintiffs arguments regarding exclusive federal jurisdiction do not apply to these claims, they, at least, should be dismissed. Indeed, the *Levy* court took this approach, retaining
(Cont'd)

attempt has been made to raise ERISA claims in the Canadian action.[5]

Defendants argue that even if the Canadian court cannot hear ERISA claims as such, dismissal of this suit will not prejudice the plaintiffs, since their ERISA claims are really no more than "garden variety" breach of contract and breach of fiduciary duty claims, which have been federalized by ERISA but are essentially identical to the common law claims brought in the Canadian action. While it may be true that certain provisions of ERISA restate common law principles, a leap from that observation to the conclusion that claims brought under ERISA in federal court are identical to and interchangeable with common law claims brought

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(Cont'd)
jurisdiction only over those ERISA claims as to which there was exclusive federal jurisdiction, while dismissing on *Princess Lida* grounds the claims as to which jurisdiction was concurrent. *See Levy*, 635 F.2d at 967.

First, we do not find it entirely clear from the language of the statute, which, if any, of the plaintiffs' ERISA claims fall within the exception cited by defendants. More importantly, however, we believe it is appropriate to treat this case as an indivisible whole with respect to the issues now before us. If, in fact, our jurisdiction over this case does present dangers of conflicting court orders warranting *Princess Lida* dismissal, dismissing only part of the case-whether it be certain of plaintiffs' ERISA claims or the pendent state law claims will do little toward alleviating that problem. Similar considerations move us to consider the case as a whole with respect to the *forum non conveniens* doctrine as well.

5. Indeed, as plaintiffs point out, the order entered by the court in the Canadian action appointing the representatives of the plaintiff class explicitly limits their representation "to the subject matter of this proceeding and not any statutory claims which may be raised under the laws of any other jurisdiction." *Bathgate et al. v. The National Hockey League Pension Society*, No. RE 785/91, slip op. at 2 (Ontario Court of Justice, June 26, 1991).

in state courts or foreign tribunals, is unwarranted. First, claims under ERISA are governed by a large body of federal case law that is entirely separate from the state or Canadian common law of contracts. Second, to accept such a conclusion requires us to assume that the United States Congress was wasting its time when it enacted these provisions of ERISA and when it enacted the provision giving exclusive jurisdiction to the federal courts; we are not willing to make such an assumption.

Defendants further argue that even though plaintiffs' ERISA claims cannot be formally raised before the Canadian court as such, in interpreting the Trust Agreement under common law principles, the Canadian court will be compelled to apply ERISA because of the way the agreement is worded. Specifically, they argue that ¶ 6.10 of the 1967 Agreement effectively incorporates the ERISA provision on which plaintiffs primarily rely, and mandates that the Agreement be interpreted consistently with that language. Thus, they argue, the Canadian court, in interpreting the Agreement under common law principles, will have to apply ERISA. Paragraph 6.10 reads as follows:

> The Club Pension Plan is for the exclusive benefit of employees of the Member Clubs and their beneficiaries, and shall be interpreted and administered to the full extent possible under the laws of Canada and the Provinces thereof, in a manner consistent with the requirements of § 401(a) of the Internal Revenue Code of 1954 of the United States of America, as it may hereafter be amended, or of any provisions of any future Internal Revenue Code of similar scope and purpose.

Appendix C

Defendants contend that plaintiffs' ERISA claims are primarily based on the "exclusive benefit rule" contained in § 403 of ERISA. Therefore, since the agreement itself states that the Plan "is for the exclusive benefit of employees," defendants argue that it effectively incorporates § 403 of ERISA. Further, since the "exclusive benefit rule" is also contained in § 401(a) of the Internal Revenue Code, the Agreement's explicit statement that it must be interpreted "in a manner consistent with" § 401(a), is equivalent to stating that it must be interpreted in a manner consistent with § 403 of ERISA. Moreover, defendants point to the fact that ERISA operated to amend the Internal Revenue Code as additional support for their argument that the above clause effectively incorporates ERISA itself into the Agreement.

We find defendants' arguments unconvincing. The fact that two statutory provisions contain similar or even identical language does not mean that they are necessarily subject to the exact same interpretation.[6] Statutory interpretation is informed by a number of

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6. Section 403 of ERISA and 401(a) of the Internal Revenue Code, in fact, do not contain identical language. Section 403 of ERISA states in relevant part:

> Except as provided in paragraph . . . the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

29 U.S.C. § 1103(c)(1). Section 401(a), of the Internal Revenue Code, entitled "Requirements for Qualification," states a similar "exclusive benefit rule" only to the extent that it defines a "qualified trust," in part, as one in which

> under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to

(Cont'd)

factors other than statutory language, such as the purpose and context of the legislation as well as its legislative history. Courts are also bound by the case law interpreting a statutory provision. Clearly, our reading of ERISA is informed by a different set of case law than our reading of the Internal Revenue Code. Similarly, the fact that the 1967 Agreement itself contains language similar to the exclusive benefit rule in ERISA does not mean that a Canadian court would be bound by the substantial body of United States federal case law governing ERISA. Finally, that portion of ERISA that operated to amend the Internal Revenue Code, Title II, is distinct and separate from the portion of ERISA on which plaintiffs rely here, Title I. The amendments to the Internal Revenue Code effected by Title II of ERISA are strictly tax provisions, which bear on such issues as the deductibility of contributions and taxation of benefits; they have nothing to do with the fiduciary duty rules of Title I under which this action is brought.

We find the logical leap that defendants urge us to make from the inclusion in the Agreement of language similar to ERISA's exclusive benefit rule and a reference to § 401(a) of the Internal Revenue Code, to the conclusion that the Canadian court will be compelled to apply ERISA itself to the agreement to be tenuous at best. The ERISA claims that plaintiffs raise before this court have

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(Cont'd)

> employees and their beneficiaries under the trust, for any part of the corpus or income to be . . . used for, or diverted to, purposes other than for the exclusive benefit of the employees or their beneficiaries . . .

26 U.S.C. § 401(a)(2). Apparently the reference in the plan Agreement to § 401(a) of the Internal Revenue Code indicates an intent that the NHL plan be administered as a "qualified trust," and as such, it is subject to the "exclusive benefit rule" of the Internal Revenue Code.

not been brought before the Canadian court, and indeed, the plain language of ERISA's grant of exclusive jurisdiction over such claims to the United States District Courts appears to preclude the Canadian court from hearing them even if they were raised there. While the common law analysis the Canadian court will employ to dispose of the claims before it may share similarities with the analysis this court would apply to plaintiffs' ERISA claims, to say that they are fungible and interchangeable is in effect to eviscerate the exclusive jurisdiction provision that Congress explicitly included in ERISA.

We therefore find that plaintiffs' ERISA claims would be lost if they were forced to press their grievances only before a Canadian court, and we further find that such loss could be of material significance to plaintiffs' case. This consideration, in conjunction with our analysis above indicating that these two actions will not require either this court or the Canadian court to exercise *quasi in rem* jurisdiction within the meaning of *Princess Lida,* leads us to conclude that the *Princess Lida* doctrine does not compel dismissal of this case.

IV. FORUM NON CONVENIENS

The next basis urged by defendants for dismissal is *forum non conveniens.* This doctrine allows a court to decline to exercise jurisdiction over a case for prudential reasons, even though its jurisdiction is otherwise proper. *See Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 507-08, 67 S.Ct. 839, 842-13, 91 L.Ed. 1055 (1947). The power to dismiss a case on *forum non conveniens* grounds is discretionary with the district court. It is a "flexible" doctrine whose "contours" are not "rigid," and the court's determination is based on a whole range of "private and public interest" factors, no one of which is primary or controlling. *See Piper Aircraft Co. v.*

Reyno, 454 U.S. 235, 249, 102 S.Ct. 252, 262, 70 L.Ed.2d 419 (1981).

In applying the doctrine, "a plaintiff's choice of forum should rarely be disturbed," *Piper Aircraft*, 454 U.S. at 241, 102 S.Ct. at 258, particularly where, as here, it is plaintiffs' home forum,[7] *id.* at 255, 102 S.Ct. at 265-66; and "the defendant bears the burden of persuasion as to all elements of the *forum non conveniens* analysis." *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43-44 (3d Cir.1988). The Third Circuit has held that even where the plaintiff was neither a citizen *nor* a resident of the United States, the defendant must show that "the private and public interest factors weigh heavily on the side for dismissal." *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 609 (3d Cir.1991) (quoting *Lacey*, 862 F.2d at 44).

We have already held, in connection with the *Princess Lida* analysis above, that plaintiffs will lose their ERISA claims if forced to go forward only in Canada, and that such loss would be prejudicial to plaintiffs. Plaintiffs argue that this factor alone precludes dismissal on *forum non conveniens* grounds. Defendants, however, point to the Supreme Court's opinion in *Piper Aircraft*, which held that the fact that a change in forum will alter the substantive law to be applied to a controversy "should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Piper Aircraft*, 454 U.S. at 247, 102 S.Ct. at 261.

Piper Aircraft itself is clearly not dispositive of the issue presently before us, since that case involved common law tort

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7. Although citizens of Canada, the two plaintiffs have been residents of New Jersey for nine and sixteen years.

claims rather than federal statutory claims as to which United States federal courts have been granted exclusive jurisdiction. Only one case has been cited to the court in which *forum non conveniens* analysis was applied to an ERISA case, *Lawford v. New York Life Insurance Co.*, 739 F.Supp. 906 (S.D.N.Y.1990). There, the district court declined to dismiss on *forum non conveniens* grounds, even though "the focus of the litigation [was] closer to Canada than New York," in part because "plaintiff's ERISA claims would be lost if plaintiff were required to bring his action in Canada." *Id.* at 920.

Defendants bring to our attention a recent First Circuit case in which the court held that the potential loss of the plaintiff's federal securities claims, over which the federal courts have exclusive jurisdiction, was *not* a factor weighing against *forum non conveniens* dismissal; *Howe v. Gold-corp Investments, Ltd.*, 946 F.2d 944 (lst Cir.1991). There the court reasoned that since "Canadian courts will either apply American law . . . or they will apply Canadian laws that offer shareholders somewhat similar protections," the plaintiff's case would not be prejudiced. *Id.* at 948.

The fact that the First Circuit apparently considers United States and Canadian securities laws to be fungible, however, does not change our analysis as to the uniqueness of plaintiffs' ERISA claims. Congress enacted ERISA for the explicit purpose of protecting "the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct. responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and *ready access to the Federal courts.*" 29 U.S.C. § 1001(b) (emphasis added). In light of such language, it seems clear that application of *forum non conveniens* in such a way as to deny an ERISA plaintiff access to the United States federal courts should

not be undertaken lightly. We are therefore inclined to follow the *Lawford* court in concluding that the potential loss of plaintiffs' ERISA claims, if not a controlling factor, is at least a substantial factor weighing against dismissal.

The other "private and public interest factors" to be considered have been identified by the Supreme Court as follows:

> The . . . private interest [factors] . . . include[] the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate; and all other practical problems that make trial of a case easy, expeditious and inexpensive." The public [interest] factors . . . include[] the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Piper Aircraft, 454 U.S. at 241, n. 6, 102 S.Ct. at 258, n. 6 (quoting *Gulf Oil*, 330 U.S. at 308-09, 67 S.Ct. at 843).

Defendants have listed numerous factors which they argue weigh in favor of *forum non conveniens* dismissal in this case.

These include the fact that the pension fund itself, the NHL Pension Society, Manulife, many of the plan participants and beneficiaries, and various potential witnesses are located in Canada.[8] Plaintiffs respond by pointing out that fifteen of the twenty-two NHL member clubs are located in this country, that the NHL itself has an office in New York City, and that 38 percent of the plan participants reside in the United States (as opposed to 58 percent who reside in Canada).

Considering the case solely from the perspective of the availability of sources of proof and convenience to witnesses, it seems that the balance tips in favor of dismissal, though not overwhelmingly so. When we add to the analysis, however, the fact that plaintiffs have chosen their home forum, and that plaintiffs will lose their ERISA claims if this case is dismissed, we are compelled to conclude that defendants have failed to meet their burden of showing that all of the factors weigh heavily in favor of dismissal. We therefore decline to dismiss on *forum non conveniens* grounds.

V. THE COLORADO RIVER ABSTENTION DOCTRINE

In *Colorado River Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the Supreme Court created a residual, catch-all category of abstention for

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8. Defendants also point to the existence of certain blocking and business secrecy laws in Quebec and Ontario which they claim will make it difficult to obtain relevant testimony and documents from third party witnesses in those provinces. We find this argument particularly speculative at this stage since there has been no showing that such evidence will in fact be needed since the plan documents themselves are required to be made available to plan participants under ERISA, 29 U.S.C. § 1024(b)(4), and since plaintiffs in the Canadian action would presumably have no reason not to cooperate with plaintiffs in this action in sharing discovery.

certain "exceptional" circumstances in which, even though none of the standard abstention doctrines apply, abstention is nonetheless appropriate for reasons of "wise judicial administration."[9] *Id.* at 817, 96 S.Ct. at 1246. This doctrine encompasses the *Princess Lida* rational for declining jurisdiction, *see id.* 424 U.S. at 818, 96 S.Ct. at 1246-47, but also includes other considerations. Defendants have extracted from the *Colorado River* opinion and a subsequent Supreme Court case, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), the following factors to be considered by courts in applying this doctrine:

1) a court first exercising jurisdiction over property "may exercise that jurisdiction to the exclusion of other courts"; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which jurisdiction was obtained; 5) whether the source of the governing law is federal or state (translate here to Canadian); and 6) the adequacy of the state tribunal (translate here to Canadian tribunal) to protect the plaintiff's rights.

With respect to the case at issue here, the *Colorado River* abstention doctrine adds little or nothing to the analysis already completed under the *Princess Lida* and *forum non conveniens* doctrines. The above factors essentially restate the same considerations involved in those analyses. The first and fourth factors obviously restate the *Princess Lida* doctrine, which we have already found does not mandate dismissal of this case. While

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9. Although *Colorado River* involved abstention of a federal court proceeding in favor of a concurrent state court proceeding, it has also been applied where the alternative action is in a foreign tribunal. *See e.g. Neuchatel Swiss General Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193 (9th Cir. 1991); *Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680, 684-86 (7th Cir. 1987).

the second and third factors might be said to weigh in favor of dismissal here, they are clearly outweighed by the fifth and sixth factors, just as in our *forum non conveniens* discussion above we concluded that the logistical considerations of availability of and convenience to witnesses were outweighed by the facts that plaintiffs ERISA claims can only be adjudicated by this court and that this is their home forum. Therefore, we hold that the *Colorado River* abstention doctrine does not require dismissal of this case.

VI. CONCLUSION

For the foregoing reasons, defendants motions to dismiss are denied.

APPENDIX D — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 19, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-5156

ROBERT DAILEY; REGGIE LEACH, on behalf of themselves and all others similarly situated

V.

THE NATIONAL HOCKEY LEAGUE; THE NATIONAL HOCKEY LEAGUE PENSION SOCIETY; THE MANUFACTURERS LIFE INSURANCE COMPANY; JOHN ZIEGLER; BOSTON PROFESSIONAL HOCKEY ASSOCIATION, INC.; CALGARY FLAMES HOCKEY CLUB; CHICAGO BLACKHAWK HOCKEY TEAM, INC.; DETROIT RED WINGS, INC.; EDMONTON OILERS HOCKEY, LTD.; 8 HOCKEY VENTURES, INC.; HARTFORD WHALERS HOCKEY CLUB; LE CLUB DE HOCKEY CANADIEN, INC.; LE CLUB DE HOCKEY LES NORDIQUES; L.A. KINGS, LTD.; MAPLE LEAF GARDENS LIMITED; MEADOWLANDERS, INC.; NASSAU SPORTS; NEW YORK RANGERS HOCKEY CLUB, a Division of Madison Square Garden Center, Inc.; NIAGARA FRONTIER HOCKEY, L.P.; NORTHSTAR HOCKEY CLUB; PHILADELPHIA FLYERS LIMITED PARTNERSHIP; PITTSBURGH PENGUINS, INC.; ST. LOUIS BLUES HOCKEY CLUB, L.P.; VANCOUVER HOCKEY CLUB, LTD.; WASHINGTON HOCKEY LIMITED PARTNERSHIP,

Appellants

Appendix D

SUR PETITION FOR REHEARING

PRESENT: BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and SEITZ,* *Circuit Judges*

The petition for rehearing filed by appellees in the above captioned matter having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Alito would grant in banc rehearing.

By the Court,

s/ Wm. D. Hutchinson
Circuit Judge

DATED: MAR 19 1993

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* Hon. Collins J. Seitz, United States Circuit Judge, was limited to voting for panel rehearing.

APPENDIX E — JUDGMENT IN LIEU OF MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 18, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-5156

ROBERT DAILEY; REGGIE LEACH, on behalf of themselves and all others similarly situated

v.

THE NATIONAL HOCKEY LEAGUE; THE NATIONAL HOCKEY LEAGUE PENSION SOCIETY; THE MANUFACTURERS LIFE INSURANCE COMPANY; JOHN ZIEGLER; BOSTON PROFESSIONAL HOCKEY ASSOCIATION, INC.; CALGARY FLAMES HOCKEY CLUB; CHICAGO BLACKHAWK HOCKEY TEAM, INC.; DETROIT RED WINGS, INC.; EDMONTON OILERS HOCKEY, LTD.; 8 HOCKEY VENTURES, INC.; HARTFORD WHALERS HOCKEY CLUB; LE CLUB DE HOCKEY CANADIEN, INC.; LE CLUB DE HOCKEY LES NORDIQUES; L.A. KINGS, LTD.; MAPLE LEAF GARDENS LIMITED; MEADOWLANDERS, INC.; NASSAU SPORTS; NEW YORK RANGERS HOCKEY CLUB, a Division of Madison Square Garden Center, Inc.; NIAGARA FRONTIER HOCKEY, L.P.; NORTHSTAR HOCKEY CLUB; PHILADELPHIA FLYERS LIMITED PARTNERSHIP; PITTSBURGH PENGUINS, INC.; ST LOUIS BLUES HOCKEY CLUB, L.P.; VANCOUVER HOCKEY CLUB, LTD.; WASHINGTON HOCKEY LIMITED PARTNERSHIP

Appellants,

Appendix E

Appeal from the United States District Court for the District of New Jersey

D.C. Civil No. 91-2564

Argued September 21, 1992

Present: Hutchinson, Alito and Seitz, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on September 21, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 31, 1991 and amended February 27, 1992, be, and the same is hereby reversed. Costs taxed against appellees. All of the above in accordance with the opinion of this Court.

ATTEST:
s/ P. Douglas Side
Clerk

Dated: February 18, 1993

Certified as a true copy and issued in lieu
of a formal mandate on March 29, 1993.

Teste: s/ P. Douglas Side
Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX F — EXCERPTS OF THE NATIONAL HOCKEY LEAGUE CLUB PENSION PLAN AND TRUST DATED NOVEMBER 17, 1977

NATIONAL HOCKEY LEAGUE
CLUB PENSION PLAN AND TRUST

SECOND RESTATED AGREEMENT, DATED THE 17th day of November, 1977 by and between the NATIONAL HOCKEY LEAGUE, 922 Sun Life Building, Montreal, Canada (hereinafter referred to as the "League"), ATLANTA HOCKEY, INC., The Omni, 100 Techwood Drive N.W., Atlanta, Georgia 30303, BOSTON PROFESSIONAL HOCKEY ASSOCIATION, INC., Boston Garden, 150 Causeway Street, Boston, Massachusetts 02114, NIAGARA FRONTIER HOCKEY CORPORATION, Memorial Auditorium, Niagara Sq. Station, Buffalo, New York 14202, CHICAGO BLACKHAWK HOCKEY TEAM, INC., Chicago Stadium, 1800 West Madison Street, Chicago, Illinois 60612, OHIO BARONS, INC., The Coliseum, 2923 Streetsboro Road, Richfield, Ohio 44286, COLORADO ROCKIES, McNichols Sports Arena, One McNichols Plaza, Denver, Colorado 80204, DETROIT HOCKEY CLUB, INC., Olympia Stadium, 5920 Grand River at McGraw, Detroit, Michigan 48208, CALIFORNIA SPORTS INCORPORATED, The Forum, 3900 West Manchester Boulevard, P.O. Box 10, Inglewood, California 90306, NORTHSTARS HOCKEY PARTNERSHIP, Met Center, 7901 Cedar Avenue South, Bloomington, Minnesota 55420, Le CLUB de HOCKEY CANADIEN INC., 2313 St. Catherine St. West, Montreal, Quebec H3H 1N2, NASSAU SPORTS LIMITED, 1155 Conklin Street, Farmingdale, New York 11735, NEW YORK RANGERS HOCKEY CLUB, Madison Square Garden, 4 Pennsylvania Plaza, New York, New York 10001, PHILADELPHIA HOCKEY CLUB, INC., The Spectrum — Pattison Place, Philadelphia, Pennsylvania 19148, PITTSBURGH PENGUINS, INC., Civic Arena, Gate #7, Pittsburgh,

Appendix F

Pennsylvania 15219, ST. LOUIS BLUES HOCKEY CLUB, INC., The Arena, 5700 Oakland Avenue, St. Louis, Missouri 63110, MAPLE LEAF GARDENS LIMITED, Maple Leaf Gardens, 60 Carlton Street, Toronto, Ontario M5B 1L1, NORTHWEST SPORTS ENTERPRISES LTD., Pacific Coliseum, 100 North Renfrew Street, Vancouver, British Columbia V5K 3N7 and WASHINGTON HOCKEY LIMITED PARTNERSHIP, Capital Centre, Landover, Maryland 20786 (hereinafter referred to as "Member Clubs"), and the NATIONAL HOCKEY LEAGUE PENSION SOCIETY, a corporation incorporated under Part II of The Companies Act (Canada) and having its head office at the City of Montreal, Canada (hereinafter called "Trustee");

WHEREAS, some of the parties hereto had previously entered into an Agreement, dated the 20th day of February, 1967, whereby there was created, effected May 1, 1966, the NATIONAL HOCKEY LEAGUE CLUB PENSION PLAN AND TRUST (hereinafter referred to as the "Club Pension Plan and Trust") and the Club Pension Plan and Trust was amended by a First Amendment, dated the 16th day of January, 1968; and

WHEREAS, the Club Pension Plan and Trust was thereafter further amended as set forth in a Restated Agreement, dated the 5th day of December, 1972, and said Restated Agreement was amended by a First Amendment, dated the 23rd day of August, 1973; and

WHEREAS, said Restated Agreement, as amended, was the subject of a favorable determination letter, dated September 28, 1973, from the Office of International Operations of the Internal Revenue Service and which letter bears Reply Reference "Au:ER1:110:FJW": and

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WHEREAS, the League and the member Clubs, desire to make further amendments to the Club Pension Plan and Trust, pursuant to § 4.01 of said Restated Agreement; and

WHEREAS, it is administratively convenient to accomplish these amendments by restating the Club Pension Plan and Trust in its amended form;

NOW THEREFORE, the Club Pension Plan and Trust is hereby amended and restated, effective May 1, 1976, to read as follows:

NATIONAL HOCKEY LEAGUE
CLUB PENSION PLAN AND TRUST

ARTICLE I	DEFINITIONS
ARTICLE II	ENTRY OF PARTICIPANTS AND AWARDS OF CREDIT
ARTICLE III	CONTRIBUTIONS AND BENEFITS
ARTICLE IV	AMENDMENT AND TERMINATION
ARTICLE V	TRUSTEE
ARTICLE VI	MISCELLANEOUS

ARTICLE I — DEFINITIONS

1.01 "Accommodation Service Player" means a Player certified as an Accommodation Service Player by a Member Club's manager.

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1.02 "Act" means the United States Employee Retirement Income Security Act of 1974, P.L. 93-406.

1.03 "Administrator" means the person who shall meet the duties of disclosure and reporting, as required by the Act.

1.04 "Amendment Date" means May 1, 1976.

1.05 "Annuity Starting Date" means the first day of the first period for which an amount is received as an annuity, provided, however, that in no event may said first day of said first period be later than the Latest Payment Date.

1.06 "Beneficiary" means a person nominated by a Participant to receive any payment on the death of a Participant and failing any nomination or effective nomination, it shall mean the legal representative of the deceased Participant. Such nomination shall be in writing and made in accordance with the provisions of a form provided for that purpose by the Trustee. The nomination shall only be and become effective if and when lodged with the Trustee (with respect to non-Contract payments) and with the issuer (with respect to Contract payments). Nominations may be revoked from time to time. After revocation of any nomination, a new nomination may be lodged. A nomination made prior to marriage shall be revoked by the death of the person nominated. A nomination in favor of a wife shall include the name of such wife and

* * *

APPENDIX G — EXCERPTS OF NATIONAL HOCKEY LEAGUE CLUB PENSION PLAN AND TRUST DATED FEBRUARY 5, 1986

NATIONAL HOCKEY LEAGUE
CLUB PENSION PLAN AND TRUST

THIRD RESTATED AGREEMENT, dated the 5th day of February, 1986 by and between the NATIONAL HOCKEY LEAGUE, 1155 Metcalfe Street, Montreal, Quebec H3B 2W2 (hereinafter referred to as the "League"), BOSTON PROFESSIONAL HOCKEY ASSOCIATION, INC., 150 Causeway Street, Boston, MA 02114, CALGARY FLAMES HOCKEY CLUB, P.O. Box 1540, Station M, Calgary, Alberta T2P 3B9, CHICAGO BLACKHAWK HOCKEY TEAM, INC., Chicago Stadium, 1800 West Madison Street, Chicago, IL 60612, DETROIT RED WINGS, INC., Joe Louis Sports Arena, 600 Civic Center Drive, Detroit, MI 48226, EDMONTON OILERS HOCKEY LTD., Northlands Coliseum, Edmonton, Alberta T5B 4M9, 8 HOCKEY VENTURES, INC., 1430 Maroons Road — Room 15, Winnipeg, Manitoba R3G 0L5, HARTFORD WHALERS HOCKEY CLUB, One Civic Center Plaza, Hartford, CT 06103, LE CLUB DE HOCKEY CANADIEN INC., 2313 St. Catherine Street West, Montreal, Quebec H3H 1N2, LE CLUB DE HOCKEY LES NORDIQUES 1979, SOCIETE EN COMMANDITE, Colisee de Quebec, 2205 Avenue du Colisse, Quebec, Quebec G1L 4W7, LOS ANGELES KINGS, INC., The Forum, Box 10, 3900 West Manchester Blvd., Inglewood, CA 90306, MAPLE LEAF GARDENS LIMITED, 60 Carlton Street, Toronto, Ontario M5B 1L1, MEADOWLANDERS, INC., Byrne Meadowlands Arena, Box 504, East Rutherford, NJ 07073, NASSAU SPORTS, Nassau Veterans Memorial Coliseum, Hempstead Turnpike, Uniondale, NY 11553, NEW YORK RANGERS HOCKEY CLUB (A DIVISION OF MADISON SQUARE GARDEN CENTER, INC.), Madison Square Garden

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Center, 4 Pennsylvania Plaza, New York, NY 10001, NIAGARA FRONTIER HOCKEY CORPORATION, Memorial Auditorium, 140 Main Street, Buffalo, NY 14202, NORTHSTAR HOCKEY PARTNERSHIP, Metropolitan Sports Center, 7901 Cedar Avenue South, Bloomington, MN 55420, PHILADELPHIA FLYERS LIMITED PARTNERSHIP, The Spectrum, Pattison Place, Philadelphia, PA 19148, PITTSBURGH PENGUINS, INC., Civic Arena — Gate No. 7, Pittsburgh, PA 15219, ST. LOUIS BLUES HOCKEY CLUB (A LIMITED PARTNERSHIP), The Arena, 5700 Oakland Avenue, St. Louis, MO 63110, VANCOUVER HOCKEY CLUB, LTD., Pacific Coliseum, 100 North Renfrew Street, Vancouver, British Columbia V5K 3N7, and WASHINGTON HOCKEY LIMITED PARTNERSHIP, Capital Centre, One Harry S. Truman Drive, Landover, MD 20785 (hereinafter referred to as "Member Clubs"), and the NATIONAL HOCKEY LEAGUE PENSION SOCIETY, a corporation incorporated under Part II of The Companies Act (Canada), 1155 Metcalfe Street, Montreal, Quebec H3B 2W2 (hereinafter called "Pension Society");

WHEREAS, some of the parties hereto had previously entered into an Agreement, dated the 20th day of February, 1967, whereby there was created, effective May 1, 1966, the NATIONAL HOCKEY LEAGUE CLUB PENSION PLAN AND TRUST (hereinafter referred to as the "Club Pension Plan and Trust") and the Club Pension Plan and Trust was amended by a First Amendment, dated the 16th day of January, 1968; and

WHEREAS, the Club Pension Plan and Trust was thereafter further amended as set forth in a Restatement Agreement, dated the 5th day of December, 1972, and said Restated Agreement was amended by a First Amendment, dated the 23rd day of August, 1973; and

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WHEREAS, said Restated Agreement, as amended, was the subject of a favorable determination letter, dated September 28, 1973, from the Office of International Operations of the Internal Revenue Service and which letter bears Reply Reference "Au:ER1:110:FJW"; and

WHEREAS, the Club Pension Plan and Trust was thereafter further amended as set forth in a Second Restated Agreement, dated November 17, 1977; and

WHEREAS, said Second Restated Agreement was the subject of a favorable determination letter, dated June 8, 1979, from the District Director, Baltimore, MD, of the Internal Revenue Service (File No. 520000712 and Case No. 52912900EP); and

WHEREAS, said Second Restatement Agreement was amended by a First Amendment, dated December 9, 1983, and by a Second Amendment, dated June 25, 1985; and

WHEREAS, the Board of Governors of the National Hockey League granted the Pension Society, on September 22, 1983, the authority to approve amendments to existing pension plans for employees of the Member Clubs, provided, however, amendments of existing pension plan for employees of the Member Clubs must first be approved in principle by the Board of Governors of the National Hockey League;

WHEREAS, the Board of Directors of the Pension Society accepted said grant of authority; and

WHEREAS, it is administratively convenient to accomplish these amendments by restating the Club Pension Plan and Trust in its amended form;

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NOW THEREFORE, the Club Pension Plan and Trust is hereby amended and restated, effective, unless otherwise stated herein, July 1, 1983, to read as follows:

NATIONAL HOCKEY LEAGUE

CLUB PENSION PLAN AND TRUST

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ARTICLE I: DEFINITIONS

1.01 "Accomodation Service Player" means a Player certified as an Accommodation Service Player by a Member Club's manager.

1.02 "Act" means the United States Employee Retirement Income Security Act of 1974, P.L. 93-406.

1.03 "Administrator" means the person who shall meet the duties of disclosure and reporting, as required by the Act.

1.04 "Amendment Date" means July 1, 1983.

1.05 "Annual Addition" means with respect to a Participant for any Plan Year commencing on or after July 1, 1983 the sum for said Plan Year of —

(a) Member Club contributions to all Contribution Plans,

(b) the lesser of —

(i) the sum of the Participant's contributions under all benefit Plans and Contribution Plans *minus* 6% of his nondeferred remuneration, or

(ii) one-half of the sum of the Participant's contributions under all Benefit Plans and Contribution Plans, and

* * *

APPENDIX H — TASK FORCE REPORT DATED JANUARY 1988

REPORT OF THE TASK FORCE ON INFLATION PROTECTION FOR EMPLOYMENT PENSION PLANS

TASK FORCE MEMBERS
Martin Friedland, Chairman
Sydney Jackson, Member
Clifford Pilkey, Member

Toronto
January 1988

Appendix H

TASK FORCE ON INFLATION PROTECTION FOR EMPLOYMENT PENSION PLANS

RESEARCH STUDIES
VOLUME 2

TASK FORCE MEMBERS
Martin Friedland, Chairman
Sydney Jackson, Member
Clifford Pilkey, Member

Toronto
January 1988

Appendix H

Legal Position in Ontario on
Withdrawals of Surpluses

Ralph E. Scane

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Appendix H

Legal Position in Ontario on
Withdrawals of Surpluses

Ralph E. Scane
Faculty of Law
University of Toronto

I INTRODUCTION

Although the assets of a plan, arising from employer and employee contributions, and the investment of these, are held by a trustee, and beneficial interests arise as a result, in my opinion the law of trusts has little application to the solution of the problem of entitlement to the surplus, as these surplus problems arise in practice. I acknowledge that this opinion is inconsistent with the approach taken in *Re Canada Trust Co. & Control Ltd.*, 103 D.L.R. (3d) 109 (B.C.S.C.) and with some of the language of the Ontario Court of Appeal in *Re Reevie et al. and Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595, leave to appeal to S.C.C. refused, 56 O.R. (2d) 192, which lays heavy emphasis on the fact that the interests created under the pension plan are interests arising under a trust.

In my view, the problem is best viewed as a problem of contract. Essentially, the question of who might be entitled to any surplus, and whether the surplus is withdrawable, is a question of interpretation of the contract.

In the plans which I have seen, there is usually a document setting out the terms of the plan, as between employer and employees, and another document establishing a trust, whereby the assets of the plan will be held by a trustee. The terms of the plan, as

between employer and employees, are in turn part of the overall contract of employment, and an employee, by taking employment, thereby becomes entitled to such rights and privileges as the plan may confer upon employees in his or her position. The beneficial interests in the assets of the plan, created by the trust itself, are the interests which the contracting parties have agreed, by the plan document, will be their respective interests. Essentially, the trustee holds the funds for the employees, past and future employees, and the employer, as their respective interests, if any, might appear under the terms of the plan. In what are probably rare situations where there is a contradiction between the terms of the plan itself, and the terms of the trust settlement of the assets of the plan, as to the interests of the parties in those settled assets, then the interests as created under the trust settlement will prevail. See *Re Heilig et al. and Dominion Securities Pitfield Ltd. et al* (1986), 55 O.R. (2d) 783, 29 D.L.R. (4th) 762, (Ont. H.C.J.)

An individual problem usually contains the further complication that the terms of the plan are, or purport to be, amendable. In the instances with which I am familiar, the dispute between employer and employees has centered around these amendment provisions. The typical problem is that the terms of the plan, as established, appear to have allocated all surplus amounts in the plan, on any termination of the plan, to employees, or at least have deprived the employer of any entitlement thereto. They have also been silent as to any right on the part of the employer to withdraw surplus from an ongoing plan. The question then arises whether the amending power can be used to change this contractual entitlement — and thus, change the beneficial interests in the underlying trust. If there is no amending power which can be, and is, validly employed to change the entitlement at termination to the employer, or to add a power in the employer to withdraw surplus prior to termination, then an attempt by an employer to withdraw

surplus from an ongoing plan which allocates surplus on termination exclusively to employees must be improper. Any such withdrawal would derogate from the beneficial interests of the contingent persons who will be entitled on termination. The derogation occurs because withdrawal defeats the present right to have the surplus applied for the plan members' benefit, should termination occur while that surplus exists.

For convenience, in this opinion, I shall use the word 'employees' to include all persons, other than the employer, having vested or contingent rights to receive benefits of some nature under the plan — present and future employees, retired employees, and, if so provided, their beneficiaries.

If the employees are to have any rights to surplus in the plan, that right must arise either by statute, or by implication of law, or by the terms of the plan.

II WHETHER STATUTE GIVES EMPLOYERS ANY PROPERTY IN SURPLUS

As far as the situation in Ontario is concerned, it is my opinion that, except in one situation, statute law does not allocate rights to actuarial surplus to employees, whether one refers to the Pension Benefits Act, R.S.O. 1980, c.373, as amended, which is currently in force ('the present Act') or the Pension Benefits Act, 1987 (S.O. 1987, c.35), which will replace it on proclamation ('the new Act').

Under the present Act, withdrawal of surplus by the employer on plan termination is permitted, subject to meeting the requirements of s. 14(6) of the Regulation. [R.R.O. 1980, Reg. 746, as amended] For situations where s. 14(6) is inapplicable — and this appears to include withdrawals from an ongoing plan s.

s.21(2) of the Regulation contemplates the possibility of withdrawal with the Commission's permission. I do not believe that s. 2(15) of the Regulation can be read to forbid withdrawal of surplus (by restricting application of any surplus so withdrawn to the objects set forth in the subsection). It is my opinion that subsection 2(15) is enabling, not mandatory. It is not drawn in exclusive terms, and I believe it can be given its full effect by reading it as preventing an argument that any present surplus or 'gain' must be ignored in assessing employer liability to make payments under s. 2(3) of the Regulation, or to make annual payments for current service under a plan, sufficient to cover accruing liability for a future year. The present Act requires that the funding of plans take place in a manner permitted by the Act, and that funding be adequate to provide for payment of all benefits agreed to be paid under a plan [s. 21(1)], but in my opinion, the Act does not carry the matter any further than this. It leaves the beneficial entitlement to surpluses unresolved. Employees have the right to insist that surpluses be withdrawn — if they can be withdrawn at all — only with Commission approval, but this right does not allocate the beneficial rights in any surplus to the employees.

The one situation where the statute law does effect an allocation of proprietary rights occurs where the terms of the plan do not allocate surplus to the employer on the termination of the plan. Under the present Act, s.14(6)(d) of the Regulation forbids any portion of the assets from 'reverting' to the employer unless the plan specifically so provides. A similar provision is found in s.80(4)(b) of the new Act. The new Act reinforces s.80(4)(b) with s.80(5), which will provide a positive allocation of the proprietary right in the surplus, on termination, to plan members, in the absence of a allocation in favor of the employer in the plan documentation. There is no explicit allocation corresponding to

that found in s.80(5) of the new Act, in the present Regulation, but the effect of s.14(6) must be the same. If the employer is forever barred from any possession and enjoyment of any surplus on termination, because all of the conditions of s.14(6) of the Regulation have not been complied with, then the employer cannot have any proprietary interest in the surplus. In theory, the surplus could then belong to either plan members, or to the Crown, as *bona vacantia*. The overall scheme of the Regulation suggests to me the underlying assumption that the fund belonged to the members if the employer was excluded because of failure to comply with s.14(6)(d), and Pennell J. so held in *Re King Seagrave Ltd. and Canada Permanent Trust Co., et al* (1985), 51 O.R. (2d)667, 20 D.L.R. (4th) 623, although there is no indication in the report that a *bona vacantia* argument was advanced.

The new Act does nothing to change this basic position. Section 10(1)11 requires the documentation to address the treatment of surplus during continuation and at termination, but it does not require any particular treatment. In ss.79 and 80, the two sections specifically addressing the question of surplus, the question of ownership of the surplus is not dealt with. The new Act contemplates withdrawal by the employer subject to meeting the conditions established in ss.79 -80, and thus must be assuming that, in some circumstances, the surplus may be the property of the employer so as to permit its withdrawal. However, in my opinion, any such property right is not being created by the Act. The new Act is merely recognizing that such a right may exist independently of the Statute, and, in the case of ongoing plans, placing what is in effect a new statutory restraint on alienation on that proprietary right, if it exists. That is, even if the property right does rest in the employer, so long as the plan is ongoing, the employer may only alienate from the plan that portion of the surplus which exceeds the amounts specified in s.80(1)(c), 80(1)(d), and 80(1)(e), and, until a

date is prescribed under s.80(10), may not remove any surplus at all. On the other hand, beyond imposing this 'restraint on alienation', the new Act does not allocate the proprietary ownership in the portions of the surplus which must be retained in ongoing plans to the employees, or to anyone else, except in the one circumstance where ss.80(4)(b) and 80(5) come into play, as discussed above.

III WHETHER EMPLOYEES OBTAIN ANY PROPERTY IN SURPLUS BY IMPLICATION OF LAW

I can see two possible sources for a property right in surplus arising in employees by implication of law — one under contract law, and one under trust law. I will reserve comment on the former to a later point in this opinion, and turn to the possibility of the employees receiving an interest in the surplus by way of trust law— specifically, by reason of a resulting trust.

In non-contributory plans, i.e., where all contributions into the plan are made by the employer, the doctrine of resulting trust has been employed to establish the employer's entitlement to surplus on plan termination, where the documentation did not expressly create such right. For example, Gould J. applied the doctrine to justify awarding surplus on termination to an employer in *Re Canada Trust Co. and Cantol Ltd,* (1979), 103 D.L.R. (3d) 109 (B.C.S.C.). In the cases where there truly is no express allocation of the beneficial interest in plan funds which are surplus to amounts required to satisfy all expressed beneficial entitlements, then the doctrine of resulting trust is properly applied to allocate that surplus to the settlor of the trust. In a non-contributory plan, that settlor is the employer.

The doctrine of resulting trust has also been adopted to

allocate to employees some percentage of a surplus on termination, in the case of contributory plans. The doctrine was so employed by Nitikman J. in *Martin and Robertson Administratrion Ltd.* v. *Pension Commission of Manitoba,* noted, (1980), 2 A.C.W.S. (2d) 249 (Man. Q.B.) to divide a surplus between employer and employees according to the payments made. As indicated previously, if employees have an interest in any surplus which may exist should the plan terminate, then, in my opinion, they have sufficient interest in any surplus of an ongoing plan to prevent an employer from derogating from that contingent future interest *unless* the employer has been given the power to do so. Of course, if the plan's terms expressly allocate the beneficial interest in the surplus, whether to employees or employer, there is no room for a resulting trust. In my opinion, this truism was overlooked in *Re Canada Trust Co., and Cantol Ltd., supra.*

In my opinion, it is not proper to consider employees who make contributions into a 'defined benefit' plan as 'settlors' of a trust, or as suppliers of part of the purchase price of an asset, (the fund investments) the title to which has been taken in another's name, in order to invoke the doctrine of resulting trust in their favor. In my opinion, *Re Martin and Robertson Administration Ltd.* v. *Pension Commission of Manitoba (supra)* was wrongly decided. Also, in *Re Reevie and Montreal Trust Co. of Canada (supra)* Zuber J.A., delivering the judgment of the Ontario Court of Appeal, referred to the employer *and* the employees as being 'the settlors' of the trust fund of the pension plan in that case, which was a contributory plan [p.600, O.R. (2d)] However, although the Court of Appeal placed great weight on the fact that the funds were trust funds, neither in this passage in particular nor in the judgment in general was the Court directing itself to the possible application of the doctrine of resulting trust. In my opinion, the mere fact that the Court, in a case which did not require a full (or any)

examination of the consequences of the designation, described contributing employees as 'settlors' does not constitute an authority that contributing employees obtain a right in surplus by virtue of the doctrine of resulting trust.

Employees should be regarded as having 'purchased' a contractual right to receive the defined benefit on retirement or otherwise, as provided in the plan. They also have the right to have their benefits secured by the underlying trust of the assets, but, beyond the limited right created by statute, as discussed in the previous section, they have no proprietary right in the funds held by the trustee beyond that required to secure their contractual right. This approach is consistent with the view of the law taken in a number of English cases dealing with associations of persons who have banded together in some unincorporated association to provide some type of financial benefit for themselves and their families.

In these cases, the typical situation is that the terms of association provide for subscriptions to be paid by members, to be held by a managing committee of trustees, in order to provide annuities to surviving spouses, or sick benefits, or some similar type of financial support. The legal problems with which we are concerned for our purposes arose when these associations terminated, or for some reason became inoperative, with unexpended surplus beyond that needed to provide any agreed benefits.

The modern, and in my opinion, the better English view in these cases is that the answer to the question of ownership of the surplus is found in contract law, not trust law, so far as the rights of member subscribers are in issue. Member subscribers are treated as contracting among themselves that, in consideration of their

subscriptions, they will receive a defined benefit, if, as and when stipulated eligibility criteria are met. This defined benefit, as established by the contract, exhausts their rights derived from their status as contributors to a common fund. There is therefore no room for a claim to surplus funds based upon a theory of resulting trust.

The leading English case of this line of cases is *Cunnack* v. *Edwards*, [1896] 2 Ch. 679 (C.A.). The case arose because a trustee held unexpended funds of an unincorporated association, all of whose members had died. The association had been formed to raise a common fund by subscriptions of the members, in order to provide annuities for widows of deceased members. The rules of the association were silent as to the ultimate disposition of funds not required for the purpose. The fund was claimed by the estate of the last surviving member. At trial, after holding that the fund was not a charity, and cy-pres could not be applied to deal with the surplus, Chitty J. held that there was a resulting trust of the surplus for the estates of the members, proportionate to their contributions. On this issue, the Court of Appeal reversed the trial judge.

Lord Halsbury L.C. said, "The entire beneficial interest has been exhausted in respect of each contributor. It was . . . a perfectly businesslike arrangement: each man contributed a perfectly businesslike arrangement: each man contributed a certain sum of money to a common fund upon the bargain that his widow was to receive, upon terms definitely settled, a certain annuity proportionate to the time during which the husband has contributed to the common fund. There never was and never could be any interest remaining in the contributor other than the right that his wife, if she survived him, should become entitled to a widow's portion thus provided. This was the final and exhaustive destination of all sums contributed to the common fund. Under

these circumstances I am at a loss to see what room there is for the contention that there is any resulting trust.' [p. 681]

Similarly, A.L. Smith L.J. said 'as the member paid his money to the society, so he divested himself of all interest in this money for ever, with this reservation, that if the member left a widow, she was to be provided for during her widowhood. Except as to this, he abandoned and gave up the money for ever.' [p. 683]

The practical result of this holding, in the circumstances applying in Cunnack was that, as the estates of the deceased former members had no interest in the unexpended fund, it was ownerless, and went to the Crown as bona vacantia.

Even after the decision in Cunnack, the doctrine of resulting trust was applied to resolve some 'surplus' situations by courts in Great Britain. See *Re Printers and Transferers Amalgamated Trades Protection Society,* [1899] 2 Ch. 184, and *Re Lead Company's Workmen's Fund Society,* [1904] 2 Ch. 196. (The latter case involved a deficiency of assets, rather than a surplus.) However, the approach taken in Cunnack has been applied in later English and Irish cases, including the most current. See *Braithwaite* v. *A.G.*, [1909] 1 Ch. 510, *Tierney* v. *Tough* [1914] 1 J.R. 142 (Ch. D. Ireland), *In Re West Sussex Constabulary's Widows, Children and Benevolent* (1930) Fund Trusts, [1971] Ch. 1, *In Re Sick and Funeral Society of St. John's Sunday School Golcar,* [1973] Ch. 51, [1972] 2 All E.R. 439, and *Re Bucks Constabulary Widows and Orphans Fund Friendly Society (No. 2),* [1979] 1 W.L.R. 936, [1979] 1 All E.R. 623.

Because they are 'members association' cases, the situations in the above cases are, of course, not an exact analogy to the situation of a 'defined benefit' pension plan established by an

employer for its employees, as we typically find it in Ontario. The 'members association' cases usually must go on to deal with other issues with which we are not concerned, e.g., whether funds derived other than from members, such as donations from outsiders, or receipts from benefit concerts and the like, are accretions to the funds derived from members contributions, and are divided similarly, or on some other basis.

One aspect of the 'members' association' cases which in my opinion is *not* applicable to the issue of entitlement to surplus of an employer's pensions the provision made in those cases for division of surplus. In the 'members' association' cases, absent a contractual provision, such as an association rule or by-law, to the contrary, the assets of an association or 'club' are divided, on dissolution, among the then existing members, provided that there is a sufficient group remaining to constitute a 'membership'.

This result flows by implication where the funds in question belong to a group of members, and where the rights of members, past, present, and future, are governed only by the contractual arrangements made among the members themselves. The pension plans which are creating the 'surplus' problem with which the Task Force is here concerned are not plans arising out of contracts between the employees *inter se*. In my opinion, our typical plans involve a contract between an employer and its employees, created by a process of adhesion to the terms of the contract by the employee pursuant to his or her overall contract of employment. The relevant terms of the plan therefore are basically the same, for present purposes, as those considered by the court in *Cunnack (supra)*. That is, in return for agreed contributions (assuming that the plan is contributory), the employee (rather than the 'member') is entitled to receive from the employer (rather than the 'association') stipulated benefits, when and if the employee

satisfies the conditions precedent for receiving them. Beyond this, in Lord Halsbury's words, 'there never was and never could be any interest remaining in the contributor.'

As suggested above, our typical plan does give to the employee some entitlement beyond a mere contractual chose in action. The employee is entitled to have funds set aside in some manner to secure payment of his or her contractual right to the benefit. However, in my opinion, that entitlement does not of itself confer any proprietary interest in funds held in the plan which are surplus to the security requirements.

Of the cases which I cited above as supporting the *ratio* of *Cunnack* with respect to absence of a resulting trust, one case, *Tierney* v *Tough supra* requires more detailed commentary at this point, because it does involve contributions to a fund from both employer and employees, and because its result, which excluded the employer from participating in sharing of *any* surplus on dissolution, and distributed that surplus among members (employees) existing at the time the society ceased to operate. On its face, this result appears to go contrary to the opinion I have expressed here.

The association in question was created in 1878 by the employer company, at the request of employees, to provide certain death benefits and sick benefits. All of certain classes of employees had to belong, and pay a weekly subscription, by way of deduction from wages. The company also contributed a stipulated weekly sum for each employee. The 'society' so created was unincorporated. Its affairs were in the hands of a management committee of six, three appointed by the company and three elected by the members, i.e., the employees. The committee had power to amend the society's rules, which determined members' benefits.

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In 1911, with the coming into force of National Health Insurance, a special meeting decided that, after a given date, there would be neither contributions accepted nor payments made. The plaintiffs, as members of the society, brought the action to have the society dissolved and wound up under the supervision of the court, and to have the rights in the remaining funds ascertained.

The court rejected the argument that the members at the time the society ceased to do business were entitled to the surplus funds still on hand by reason of resulting trust. Thus, the decision in *Cunnack* was followed on this critical point. However, *unlike* the situation in *Cunnack,* the society here was still in existence, still had members, and still could, through its committee, amend the society rules to allocate all the funds to the surviving members. This disposed of any claim of the Crown to take by *bona vacantia.* The only possible restriction on this ability of the members to so dispose of the funds was a possible right in the company, which had contributed to the funds. The potential claim of the company was disposed of by treating the company's contributions as gifts to the society, i.e., as an accretion to the funds of the society. In turn, those funds, including the accretions, would belong to the aggregation of individuals who from time to time formed 'the society' but whose rights to make use of the funds were, during the existence of the society, controlled by the contract between them.

The decision that this 'society', created by the company for the purpose of facilitating part of the employment arrangements between the company and its employees, created the same kind of legal relationships as an association of members banding together for their mutual support, is surprising. Admittedly, the company, in setting up the 'society', used the form and trappings of these 'mutual support' organizations, and this appears to have been a major element in its failure to share on terminations. From today's

vantage point, the conclusion that the company's contributions were 'gifts' to a fund of an independent association, of no different status than a donation from a sympathetic stranger to the funds of an unincorporated 'members' club' would be, is even more surprising. Perhaps, in Ireland, in 1878, it was easier to regard an employer's contribution to a social benefit plan for employees as a gift, rather than as part of a compensation package, designed in response to market forces, arising out of an overall employment contract, than is the case in Ontario today. On this point, I believe that the Irish court ignored the substance in favour of the form, and decided the case incorrectly, but whether or not this is so, the *ratio decidendi* on this point is not applicable to what I understand to be a typical 'defined benefit' pension plan in Ontario today. Pension plans create direct contractual relations between employer and employees, under which the employee receives stipulated pension rights, and a corresponding beneficial charge against the assets of the fund, to secure those rights, as part of the compensation for his or her services. There is, in my view, nothing analogous to an 'association' of employees in which the equitable ownership of the fund could be said to be vested, and to which the employer's contributions could accrete.

In summary to this point, then, it is my opinion that neither statute (except to the limited extent referred to above) nor the doctrine of resulting trust gives to employees, or other beneficiaries of pension rights under 'defined benefit' plans, any ownership right in amounts surplus to the requirements of the plan for funding the pension obligations thereunder.

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IV THE ALLOCATION OF PROPERTY RIGHTS IN SURPLUS BY CONTRACT

In a number of plans which I have seen, whether in reported cases or otherwise, the contractual provisions have in some manner excluded the employer from any right to participate in surplus on the termination of the plan, and have provided for distribution among the then employees, or some wider group of beneficiaries. For example, the terms of the plan under review by Addy J. in *Little et al* v. *Kent-McClain of Canada Ltd., et al.* (S.C.O. February 25, 1972, unreported) were quoted as reading:

> '16. If the plan is discontinued, the Pension Trust Fund shall be allocated among the members, retired Members, their estates, beneficiaries and contingent annuitants in an equitable manner determined by the Pension Committee in consultation with the Actuary and the Company.'

The term 'Pension Trust Fund' was contractually defined as 'the assets for the time being in the hands of the Trustee under the Trust Agreement.'

This exclusion of the employer on termination was reinforced by an exclusion of the employer from beneficial rights in the funds of the ongoing plan:

> '. . . all contributions made by the Company are irrevocable and together with all contributions made by the members, may only be used exclusively for the benefit of Members, retired members, their estates, beneficiaries and contingent annuitants.'

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Where a plan makes some similar allocation of surplus on plan termination, excluding the employer from any beneficial interest in the plan assets upon termination, the beneficial rights of ownership in the funds reside in that contingent class of persons who are designated as entitled. As I have previously suggested, an attempt to withdraw surplus from an ongoing plan derogates from the right of that contingent class to share surplus funds on termination. For, while the fact that there is a present surplus does not guarantee that, on termination, there will be any surplus to be distributed, according to the plan, permitting withdrawal from an ongoing plan would defeat the right to have that surplus applied for the benefit of the group designated to share on termination, should termination occur while that surplus exists.

Thus, where the plan contains some provision, of an effect similar to the provision in the plan quoted in the *Little* case, *supra* it is my opinion that the employer has no right to withdraw surplus from an ongoing plan, ***unless*** the employer derives that right under the terms of the plan itself. For example a plan, in theory, could give to the employer power to withdraw, for its own benefit, amounts determined in some manner to be surplus to funding requirements.

Exercise of such a power would be, in effect, an exercise *pro tanto* of a power of appointment over the assets of the plan, vesting the beneficial ownership of the assets designated for withdrawal in the employer, and permitting the trustee to transfer those surplus assets over to the new beneficial owner. There is nothing in trust law theory to impede such a result. As Professor Waters has remarked, '. . . a settlor may reserve not only a power of revocation, but any power he likes provided that he does not contravene any principle of public policy.' [The Law of Trusts in Canada (2nd ed.), at p. 211.] For example, the Supreme Court of

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Canada accepted the validity of a wide power in trustees to reduce a benefit currently being enjoyed by a pension recipient. In this case, there was no contractual element to control use of the power. See *Write* v. *Diocese of Huron* (1884), 11 S.C.R. 95.

Many of the problems in the reported cases, and in other disputes of which I am aware, have arisen because an employer has attempted to create, at some time *after* a plan has been established, such an express power to remove surplus from an ongoing plan. The employer has been attempting to make use of a power of variation, commonly found in plans. Again referring to the plan before Addy J. in *Little, supra*, it contained a provision that the employer 'must necessarily reserve the right to change, modify, suspend or discontinue the Plan, or reduce its contributions, if in the future the Board of Directors of the Company consider [*sic*] circumstances so require.'

In my opinion, what these cases are turning on is the true scope of the amending power upon which the employer is attempting to rely in the particular case. To review, *if* the documentation either contains a power in the employer to withdraw surplus, or if that power can be created by use of a power of variation, there is nothing in trust law doctrine to preclude the use of such a power to make the withdrawal.

In my opinion, what the courts in cases such as *Little, supra Re Reevie et al. and Montreal Trust Company of Canada supra,* or *Re Heilig et al. and Dominion Securities Pitfield Ltd. et al. supra,* are doing, when one cuts through the language they are using in the particular cases, is applying a *contra proferentem* approach against the employer in construing the power of amendment or modification reserved by the plan. Where the court finds language in the plan which it construes as irrevocably dedicating all

contributions into the plan to the use of employee members of the plan, then (at least absent the clearest language to the contrary), the court reads any power of amendment exercisable by the employer as restrained and controlled by that original dedication. That is, the power will be treated as not extending to an amendment which would permit the plan funds to be used for a purpose other than the use of the employees or other beneficiaries, and therefore, as not extending to permit employers to withdraw surplus, whether from ongoing plans or on termination.

The approach of the Canadian courts, exemplified by the cases cited above, is consistent with the approach taken to functionally similar problems by Federal courts in the United States of America.

In the U.S.A., under the Employment Retirement Income Security Act of 1974, (ERISA), the general rule is that assets of a pension plan governed by that Act are to be held for the exclusive benefit of plan members. However, ERISA provides for an exception to this general rule, in that, on termination, residual assets may be distributed to the employer if all liabilities under the plan are satisfied, if such distribution does not contravene any law, and if the plan provides for distribution in the circumstances. These provisions, then, are in substance very similar to the requirements set out in s.14(6) of Regulation 746, as amended, under the present Pension Benefits Act, or under s.80(4) of the new Act. Prior to ERISA, it was apparently common for U.S. plans to contain clauses prohibiting diversion of assets from the exclusive benefit of participants, to enable the plans to qualify for preferential tax status under the Internal Revenue Code. It was not common for plans to make any reference to surplus funds. After ERISA, a number of cases arose where employers sought to make use of amendment powers in plans to expressly provide that actuarial surpluses existing at termination should belong to

employers, to comply with one of the ERISA requirements for withdrawal of surplus by employers. Several legal challenges by employees to such amendments reached the Federal courts. The usual line of attack was to argue that the amending power was restricted in its operation by its own terms or the terms of other clauses in the plans from creating any right in an employer to surplus funds. If the use of the amending power could be so restricted the plan would not provide for withdrawal by the employer, and, under ERISA, withdrawal would then be precluded.

A series of judgments in the United States Court of Appeals established that the resolution of this issue turned on the wording of the particular documents. However, in general, the U.S. courts have been more willing to construe favorably to employers than have Ontario courts in the cases mentioned. The approach taken by the U.S. courts which have found that the challenged amendment was permissible, and successful in its goals, resembles that taken by Anderson J. in *Campbell et al.* v. *Ferrco Engineering Ltd. et al.* (1984), 4 C.C.L.I. 268 (Ont. H.C.J.). That is, certain terms in the documents are 'read down' in their meaning, because of the context. For example, in *Ferrco*, the plan originally provided that, in the event of discontinuance, the assets would be used exclusively for the provision of benefits to members in an equitable manner. A subsequent amendment purported to provide that on discontinuance, no member should receive more than the stipulated benefit, and any surplus assets would belong to the company. Anderson J. construed 'benefits', as used in the original plan, as referring to 'benefits to which members are expressly entitled pursuant to other articles of the plan', and not as including additional benefits which might derive from employment of surplus. Thus the obligation to use funds 'exclusively for the provision of benefits to members' was discharged when the

defined benefits were provided for, and the clause therefore did not prohibit an amendment to allocate surplus to the employer.

As mentioned, the U.S. cases have used a similar approach. Amendment provisions, which contained provisions to the effect that no amendment should enable an employer to recover or divert from the participants the funds held in the trust, were treated as prohibiting diversion prior to satisfaction of all of the plans' liabilities under its defined benefit provisions, but not beyond this point. Thus, amendments to allocate surplus to the employer were not barred. See *Re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128 (E.D. Pa.1977), aff'd without opinion, 582 F.2d 1273 (3rd Cir. 1978); *Pollock* v. *Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1979), aff'd without opinion 622 F.2d. 575 (2nd Cir. 1980); *Washington - Baltimore Newspaper Guild Local 35* v *Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), aff'd without opinion, 729 F. 2d 863 (D.C. Cir. 1984), and *Wilson* v. *Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987). However where the language of the original documentation, dedicating the funds to participants and excluding recovery by the employer, was stronger, then the purported amendment would be treated as improper, and a result similar to that reached by the Ontario courts in *Little, supra,* or *Reevie, supra,* would be reached. See *Bryant et al.,* v. *International Fruit Products Co., Inc., et al.* 793 F.2d. 118 (6th cir. 1986), cert. denied 107 S. Ct. 576 (1986).

It may be of some interest to note apparently conflicting policy approaches taken by the U.S. courts in their approach to the construction of the documents before them in a particular case, as identified by the dissenting Circuit Judge in *Wilson* v *Bluefield Supply Co., supra.* The Court in *Moyer, supra*, saw the result in that case as 'consistent with the policies underlying the enactment of ERISA'. 'Employers will continue to fund their plans . . . but will

not be penalized for over funding in 'an abundance of caution' as a result of a miscalculation on the part of an actuary. Thus, employees will continue to be protected to the extent of their specific benefits but will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the plan on a sound financial basis.' (per McGlynn, Dist. Judge, in *Moyer*, 441 F. Supp 1128 at 1132). On the other hand, the court in Bryant saw recapture by the employer as a windfall to the employer, at least to the extent that the employer had previously obtained tax advantages from its contributions. See the majority judgment in *Bryant*, at 793 F.2d 118 at 123, which stated, 'We do not believe this decision will result in a windfall to the [employees]. The plan was designed to provide some financial security for the employees, all of whom lost their jobs when the company ceased operations shortly after terminating the pension plan.'

The restrictive reading of the scope of a power of amendment, which, perhaps somewhat inaccurately, I have characterized as an application of the *contra proferentem* doctrine, may also be arrived at on the basis of a contract doctrine that there is some ultimate limitation upon the scope of a power given to one contracting party to amend unilaterally the terms of a contract. The alterations made must not be incompatible with the fundamental purpose of the contract, or, in another formulation, not outside the contemplation of the parties at the time the contract is made. None of the pension plan cases in Canada or in the U.S.A. have referred to this doctrine from contract law in the reasons for judgment, but the approach which is guiding the courts currently is consistent with these cases.

First, subject to the above controlling principle, a unilateral power of amendment may be employed to modify, and even remove contractual rights from another party, even after

enjoyment of the rights has commenced.

An early leading case is *Smith* v. *Galloway*, [1898] 1 Q.B. 71. S joined a benefit society whose rules contained a power of amendment by a special meeting of members. Subsequently, S claimed a sick benefit from the society, was awarded such a benefit, and commenced to receive it. Six years later, in 1896, the amending power was duly exercised to change the rule governing the category of benefit recipients which included S, to subject that category of persons to certain conditions similar to those already imposed on other categories of recipients. S breached the conditions, and the society excluded him from further benefits. S brought this action, in which the propriety of utilizing the amending power to deprive him of a benefit already being enjoyed was raised. Wright J. (Kennedy J. concurring) said '. . . I think it was under a power of alteration in existence at the date when the plaintiff joined the society that the alteration in 1896 was made, and that [the plaintiff] cannot be heard to complain of the exercise of a power to which by joining the society he assented.' (p. 76)

Wright J. expanded upon this proposition as follows:

> 'Then the second point made by the plaintiff was that if the plaintiff did by joining the society assent to a subsequent alteration of the rules, he did so subject to this limitation, that the alteration should not affect a vested interest, and should not deprive him of any benefit to which he had already become entitled in possession at the time of the alteration made. But I can see no ground for introducing any such limitation into his contract. It is a matter of everyday occurrence

> for societies such as this to make alterations in rules as to the allowance of sick pay affecting even those members who are already in receipt of it. When the only contract between the society and the member is the original contract under which he became a member and that, as is the case here, provides for alterations to the rules, he is bound by any subsequent alteration *that may be made within the power of alteration,* whatever the extend of the alteration may be.' (p. 77) (my underlining)

The case indicates that, as a matter of law, a very wide scope may be given to a unilateral amending power in a contract. However, the underlined portion suggests a possible control over this potential, i.e., a restrictive construction of the scope of the power.

Smith v *Galloway, supra,* appears to have been relied upon by the Ontario Court of Appeal in *Baker* v. *I.O.F.*, 24 O.A.R. 585, affirming (1897), 28 O.R. 238, where the exercise of a power of amendment, contained in the original by-laws of the organization, to reduce a sick benefit after the plaintiffs had qualified for it and started to receive it, was upheld.

The Ontario Court of Appeal also considered the effect of an amending power in *Armstrong* v. *Toronto Police Benefit Fund* (1902), 1 O.W.R. 829, although here, language is used which can be read as restricting amending powers to situations where no rights have vested. The plaintiff claimed a certain pension benefit from a benefit society organized in 1881. The original rules were amended in 1894, changing the method of calculation to the plaintiff's detriment. The plaintiff retired in 1990, and claimed a benefit calculated on the basis of the original rules. The C.A.,

upholding the lower court, held that the amendments were binding on the plaintiff. There was no question of vested rights involved, for, in 1894, when the rules were amended, the plaintiff had not acquired any vested right to a pension. His rights were the same as all other members until he acquired a vested right under the rules in force at the time he so acquired such right. Unfortunately, the report does not state whether the amendment to the rules was pursuant to an express amending power, or what the terms of such power were. We are therefore unable to determine whether the emphasis on 'vested rights' as an apparent 'cut-off' point for the operation of an amending power was considered by the Court to arise out of some (unstated) general principle, or whether it arose from the express terms of the amending power contained in the original rules. By 'vested rights', the Court seems to be referring to rights to which a person has fully qualified, and upon the enjoyment of which the person has entered.

Smith v. *Galloway, supra,* was followed in England in *Morgan* v. *Driscoll* (1922), 38 T.L.R. 251, and *Grimwood* v. *Aldenham* (1928), 72 Sol. J. 569. However, the cases were now suggesting that there would be some ultimate limitation upon the scope of the power, in that the alterations made by the amendment must not be incompatible with the fundamental purpose of the contract. This restriction was utilized, and possibly expanded, in *Hole* v. *Garnsey,* [1903] A.C. 472 (H.L.).

Simplifying the facts greatly, a society had rules governing, *inter alia,* the amount of shares for which members in certain categories must subscribe. The rules contained an amending power, exercisable at a special general meeting. This power was utilized to amend the rules in such a way as to require members in the plaintiff's position to subscribe for a substantial number of additional shares. The plaintiff was not part of the majority which

voted for the amendment, and did nothing subsequently to acquiesce in the amendment.

The House of Lords held that, although there was nothing either in the governing statute or the general law to preclude the imposition of such an open-ended liability upon the plaintiff, if the liability had been imposed by the original rules, nevertheless as a matter of principle, such a term could not be introduced later by employment of an amending power. Lord Dunedin (at p. 487), puts the basis of the disallowance on vagueness and uncertainty of terms. If the obligation of the plaintiff to take shares could be varied, without any restriction or original guidelines, as to the range of amendment, the obligation would be too uncertain to be enforced. Apparently, although he does not expressly say so, what Lord Dunedin is doing is saving the original obligation, created by the rules in effect when the plaintiff joined, from the vice of uncertainty by refusing to recognize the validity of the amending power to change the rules.

Lord Atkin, who concurred with both Lord Dunedin and Lord Tomlin, appeared to place his own emphasis on the inability to use an amending power to alter a fundamental purpose of the association for which the contract was made.

> 'I think that the consent of a member to such a rule as [the amendment power] is not an assent to have the purposes of the society or the amount of his share subscription altered against his will. Full effect is given to the rule by limiting its operation against dissentients to matters which are within the scope of the administration of the venture as originally framed. I should myself regard as within this

> definition such matters as the annual subscription to a social or other club which may fairly be regarded as a matter of internal administration. But an increase in capital contribution is something quite different.' [p. 496]

A still different emphasis to the reasons for narrowing the scope of a unilateral amending power was given by Lord Tomlin. He said, at p. 500 *et seq.*:

> 'Does a power enabling a majority to amend the rules justify as against a dissenting member any alteration whatever where, as here, neither by the statute nor the rules themselves is any one rule expressed to be more fundamental and unalterable than any other?
>
> The answer . . . must be in the negative. In construing such a power as this, it must, I think, be confined to such amendments as can reasonably be considered to have been within the contemplation of the parties when the contract was made, having regard to the nature and the circumstances of the contract. I do not base this conclusion upon any narrow construction of the word 'amend' in the Rule 64 [the amendment power] but upon a broad general principle applicable to all such powers.'

Lord Tomlin went on to conclude that the amending power there did not extend to permit the amendment sought to be made,

because the parties could not have contemplated that they would ever be liable to a levy over and above that contemplated under the original terms.

Lord Tomlin's *ratio* was adopted in *Wunderlick Bros.* v. *North West Mutual Fire Association,* [1936] 1 W.W.R. 297, 300 (Sask. C.A.), to defeat an attempt to amend rules, after insurance policies had been taken out, to reduce the participation dividends to which persons who did not renew their policies would be entitled. Citing *Hole* v. *Garnsey,* Turgeon J.A. held that this result could never have been in the contemplation of the parties when the contract was made.

The doctrine applied in cases such as *Hole* v. *Garnsey* does not, of itself compel a conclusion either way on the scope of an amending power reserved to an employer in a pension plan. The doctrine will only become applicable if it is concluded that the amendment proposed has a result which is outside the contemplation of the parties when the contract was made. In my opinion, when the court finds terms in the original plan which purport to exclude the employer from participation in funds paid into the hands of the plan trustee, the courts will reach the conclusion that the amendment is not within the parties' contemplation, unless the power to amend in this fashion is granted in the most explicit terms.

V. Summary

Under present Ontario law, there is no general answer possible to the question of who might be entitled to any surplus in an ongoing 'defined benefit' pension plan. Present legislation provides controls on the withdrawal of any surplus funds, but, except in the limited circumstances previously noted, it does not address proprietary entitlement to that surplus.

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The question of proprietary entitlement to a surplus must be answered by analysis of the terms of the plan. In many plans in which a dispute has arisen between employer and employees over the employer's right to withdraw surplus, the terms of the plan have been construed to at least exclude the employer from any participation in the accumulated funds of the plan, should the plan terminate. In such case, the employer can have no right to any surplus in an ongoing plan, unless the plan explicitly creates such a right. Attempts to make use of a general amending power, frequently reserved to employers, in order to create an explicit right to remove surplus, will generally be struck down by the court, on the basis that the power to amend is not wide enough in scope to reverse the original exclusion of the employer.

However, if the terms of the plan are not construed as precluding participation by the employer in any surplus, trust law doctrine will not give the employees any right to participate in a surplus as owners or part owners thereof. The better line of cases holds against allowing any such right to arise in their favour by virtue of a resulting trust. If they are to have participatory rights in the surplus of an ongoing plan (or of a terminating plan) it is because the terms of the plan or, where the plan does not allocate surplus to the employer on termination, the statute, allocate such rights to them. Absent such allocation, they have no right beyond the right to have their contracted benefits secured as required by the plan and the general law.